Supreme Court, U.S.
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No. 05-

In the Supreme Court of the United States

SERGIO LOEZA-DOMINGUEZ,
Petitioner,

v.

ALBERTO GONZALES, ATTORNEY GENERAL OF THE UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether decisions of the Board of Immigration Appeals to apply the Affirmance Without Opinion regulation, 8 C.F.R. §1003.1(e)(4), are "committed to agency discretion by law" and therefore not subject to judicial review under the Administrative Procedure Act, 5 U.S.C. § 701(a)(2).

2. Whether the court of appeals violated the remand rule of *S.E.C. v. Chenery Corp.*, 332 U.S. 194 (1947), *INS v. Ventura*, 537 U.S. 12 (2002), and *Thomas v. Gonzales*, 547 U.S. ___ (2006), when it decided, in the first instance, and without prior resolution of the question by the Attorney General, that the immigration statute 8 U.S.C. § 1227(a)(2)(E)(i), which provides for the deportation of aliens convicted of "a crime of child abuse," must be interpreted in conformity with the Black's Law Dictionary definition of "child abuse."

PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the case caption.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Sergio Loeza-Dominguez respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The Eighth Circuit's opinion (App. 2a-7a)[1] is reported at 428 F.3d 1156. The order of the Eighth Circuit denying the petition for rehearing and rehearing en banc (App. 2a) is unreported. The decisions of the Board of Immigration Appeals (App. 8a) and the immigration judge (App. 9a-14a) are unreported.

JURISDICTION

The judgment of the Eighth Circuit was entered on November 17, 2005. The Eighth Circuit denied a timely petition for rehearing and rehearing en banc on February 7, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Administrative Procedure Act, 5 U.S.C. §701(a), provides:

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[1] The abbreviation "App." refers to the appendix to this petition.

(a) This chapter applies, according to the provisions thereof except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

The deportation statute, 8 U.S.C. § 1227(a)(2)(E)(i) provides:

(i) Domestic violence, stalking, and child abuse.-Any alien who at any time after entry is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable. For purposes of this clause, the term "crime of domestic violence" means any crime of violence (as defined in section 16 of title 18, United States Code) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.

The Affirmance Without Opinion regulation, 8 C.F.R. § 1003.1(e)(4)[2], provides:

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[2] This regulation was redesignated as 8 C.F.R. § 1003.1(e)(4) on February 23, 2003. Previously it was numbered 8 C.F.R. § 3.1(e)(4). *See* 68 Fed. Reg. 9824 (Feb. 28, 2003).

(4) Affirmance without opinion. (i) The Board member to whom a case is assigned shall affirm the decision of the Service or the immigration judge, without opinion, if the Board member determines that the result reached in the decision under review was correct; that any errors in the decision under review were harmless or nonmaterial; and that

> (A) The issues on appeal are squarely controlled by existing Board or federal court precedent and do not involve the application of precedent to a novel factual situation; or
>
> (B) The factual and legal issues raised on appeal are not so substantial that the case warrants the issuance of a written opinion in the case.

(ii) If the Board member determines that the decision should be affirmed without opinion, the Board shall issue an order that reads as follows: "The Board affirms, without opinion, the result of the decision below. The decision below is, therefore, the final agency determination. See 8 CFR 1003(e)(4)." An order affirming without opinion, issued under authority of this provision, shall not include further explanation or reasoning. Such an order approves the result reached in the decision below; it does not necessarily imply approval of all of the reasoning of that decision, but does signify the Board's conclusion that any errors in the decision of the immigration judge or the Service were harmless or nonmaterial.

STATEMENT

This case presents the important question whether decisions of the Board of Immigration Appeals to apply the "Affirmance Without Opinion" regulation, 8 C.F.R.

§ 1003.1(e)(4), are "committed to agency discretion by law" and therefore not subject to judicial review under the Administrative Procedure Act. 5 U.S.C. § 701(a)(2).[3] The Eighth Circuit, in its controversial decision, *Ngure v. Ashcroft*, 367 F.3d 975, 983 (2004), became the first court of appeals to rule that BIA application of the AWO regulation is wholly committed to agency discretion. The Tenth Circuit followed *Ngure* in *Tsegay v. Ashcroft*, 386 F.3d 1347, 1355-58 (2004). Four other courts of appeals have explicitly rejected the proposition that BIA application of the AWO regulation is committed to agency discretion by law, and have acted to correct the BIA's misapplication of the regulation. *Haoud v. Ashcroft*, 350 F.3d 201, 211 (1st Cir. 2003); *Smriko v. Ashcroft*, 387 F.3d 279, 290-97 (3d Cir. 2004); *Zhu v. Ashcroft*, 382 F.3d 521, 526-27 (5th Cir. 2004); *Chen v. Ashcroft*, 378 F.3d 1081, 1086-88 (9th Cir. 2004).

This question is of great importance because the BIA issues thousands of AWO orders each year, and the peculiarly secretive nature of the AWO process complicates circuit court review in certain recurrent scenarios, detailed below. The courts' disagreement about their authority to correct BIA misapplication of the AWO regulation has resulted in divergent responses to the thorny problems that AWO secrecy causes for judicial review, including notably inconsistent application of the remand rule that this Court set forth in *S.E.C. v. Chenery Corp.*, 332 U.S. 194 (1947), affirmed in the immigration case, *INS v. Ventura*, 537 U.S. 12 (2002), and reaffirmed in a second immigration case earlier this term, *Thomas v. Gonzales*, 547 U.S. ___ (2006). The instant case

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[3] The following abbreviations will be used throughout the rest of the petition: "BIA" for Board of Immigration Appeals, "AWO" for affirmance without opinion, and "APA" for Administrative Procedure Act.

illustrates how the Eighth Circuit's controversial holding in *Ngure* has distorted its review of agency action and violated *Chenery's* remand rule.

1. Legal background

a. The APA provides that any person "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review." 5 U.S.C. § 702. The only exceptions to this general rule are where (1) a statute prohibits review, or (2) agency action is committed to agency discretion by law. 5 U.S.C. § 701(a). This Court's precedents have made clear that the latter exception is a narrow one that will only apply in rare circumstances where a law is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion and there is essentially "no law to apply." *Heckler, v. Chaney*, 470 U.S. 821, 830-31 (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971)).

Heckler held that the Food and Drug Administration's decision not to undertake an investigation requested by death row inmates into state use of certain drugs for executions was committed to agency discretion and unreviewable. 470 U.S. at 830-32. This Court found no manageable standards that could guide judicial review, both because the Food and Drug Act was silent about how the FDA should exercise prosecutorial discretion ("no law to apply"), and because the traditionally discretionary decision of whether to undertake enforcement necessarily involved a "complicated balancing of a number of factors which are peculiarly within [the agency's] expertise" such as resource allocation, policy priorities, and judgments about the likelihood of success. *Id.* at 831-32. *Heckler* observed that agency decisions not to undertake

enforcement are the classic example of discretionary actior unguided by statute, and contrasted this with agency actions performed pursuant to statutes that do provide specific guidelines about whether and how the agency must carry out its duties. *Id.* at 831. Importantly, this Court further explained that when an agency refuses to take action, "it generally does not exercise its coercive power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect." *Id.* at 832.

b. The BIA first implemented the AWO regulation in 1999 as part of a streamlining initiative to reduce backlogs at the agency, though its use was limited initially. *See Executive Office for Immigration Review; Board of Immigration Appeals: Streamlining,* 64 Fed. Reg. 56135 (Oct. 18, 1999). In 2002, the Attorney General made the AWO procedure a centerpiece of enhanced procedural reforms at the BIA, and dramatically expanded its application. *See Board of Immigration Appeals: Procedural Reforms to Improve Case Management*, 67 Fed. Reg. 54879 (Aug. 26, 2002). AWO cases are decided by individual Board members. The Board member undertakes a full-record review of each case and renders a decision on the merits. The Board member reviews immigration judge ("IJ") factual findings under a "clearly erroneous" standard, but reviews *de novo* all questions of law, discretion, judgment and any other issues raised in the administrative appeal. 8 C.F.R. § 1003.1(d)(3)(ii)-(iii). The BIA member to whom the case is assigned must conduct a three step analysis, and must affirm the IJ without opinion if he or she determines:

1. The "result" reached by the IJ was "correct;" AND
2. Any errors by the IJ were "harmless or

nonmaterial;" AND

3. EITHER: A) The issues on appeal are "squarely controlled by an existing Board or federal court precedent and do not involve the application of precedent to a novel fact situation;" OR B) The issues raised on appeal "are not so substantial that the case warrants the issuance of a written appeal."

8 C.F.R. § 1003.1(e)(4)(i). If the BIA member determines an IJ opinion meets these criteria, he or she issues a boilerplate order: "The Board affirms, without opinion, the result of the decision below. The decision below is, therefore, the final agency determination. See 8 C.F.R. 1003.1(e)(4)." The regulation further specifies that the AWO order "shall not include further explanation or reasoning," and that "[s]uch an order approves the result reached in the decision below; it does not necessarily imply approval of all of the reasoning of that decision." 8 C.F.R. § 1003.1(e)(4)(ii).

c. The AWO process is peculiar because the BIA affirms only the "result" of the IJ decision but never the IJ's reasoning. This scheme may be unprecedented in that it explicitly decouples reason from result in the administrative process, leaving the circuit court to review an opinion that, invariably, *may or may not* reflect the reasoning the agency actually used to decide the case. *See Albathani v. I.N.S.*, 318 F.3d 365, 377 (1st Cir. 2003)("Because the summary affirmance is only of the 'result' and not the reasoning, this means courts of appeals are forced to review a decision which may or may not contain the reasoning of the BIA. The court thus reviews the BIA decision without knowing its basis.").

d. Aliens have challenged the AWO regulation both on its face and as applied. Facial challenges typically have raised

due process and administrative law arguments, and have tended to conflate the two issues. Most aliens argued that (1) AWO orders violate *Chenery* because the BIA's reasoning is not stated with sufficient clarity to be discerned by a reviewing court, and (2) the violation of *Chenery* in turn violates due process because the alien cannot obtain meaningful judicial review of the agency's decision.

The First Circuit was the first court to address these paired arguments in its influential opinion, *Albathani v. I.N.S.*, 318 F.3d at 376-78. As noted above, *Albathani* acknowledged the secrecy of the AWO process, yet upheld the regulation. *Albathani* held that aliens have no constitutional right to any administrative appeal, so an IJ opinion afforded under the AWO regulation is all that an alien is entitled to. *Id.* at 376. Any subcomponent of the agency – IJ or BIA – may provide the reasoned decision necessary for judicial review. *Id.* So long as the IJ opinion is available for review, the fact that the BIA has rendered a separate, undisclosed decision will not violate *Chenery* in "functional" terms, and the alien's due process rights are satisfied:

> Because the summary affirmance is only of the 'result' and not the reasoning, this means courts of appeals are forced to review a decision which may or may not contain the reasoning of the BIA. The court thus reviews the BIA decision without knowing its basis. The summary affirmance scheme does create these problems, but they do not render the scheme a violation of due process or render judicial review impossible. Nor does the scheme violate any statute.
>
> The courts will continue to have the IJ's decision and the record upon which it was based available for

> review. . . . This permits a court to carry out intelligent review.
>
> In functional terms, if the BIA does not independently state a correct ground for affirmance in a case in which the reasoning proffered by the IJ is faulty, the BIA risks reversal on appeal. One of the several justifications for *Chenery's* requirement for explicit reasons derives from a limitation on the courts' ability to substitute different grounds. . . . In short, if the BIA identifies an alternative satisfactory ground for upholding denial of asylum in a case with an otherwise unsatisfactory decision by the IJ, it must state it or risk remand. Ordinarily, the case will be remanded to the agency, and the agency will not, in the end, have saved any time or effort.

Albathani, 318 F.3d at 377-78 (citations omitted).[4] All the circuit courts have followed *Albathani*'s logic. *Zhang v. Ashcroft*, 362 F.3d 155, 157 (2d Cir. 2004); *Dia v. Ashcroft*, 353 F.3d 228, 241 (3d Cir. 2003)(en banc); *Belbruno v. Ashcroft*, 362 F.3d 272, 280-81 (4th Cir. 2003); *Soadjede v. Ashcroft*, 324 F.3d 830, 832-33 (5th Cir. 2003); *Denko v INS*,

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[4] *Albathani's* functional analysis of *Chenery* (like the arguments raised by most alien petitioners) appears to conflate the requirement of a clear agency decision with individual due process concerns, measuring the adequacy of the AWO scheme for purposes of *Chenery* by the degree to which that scheme meets the minimal due process rights of aliens to some intelligible agency decision. This seems to be a confusion of categories. *Chenery's* requirement of a clear agency decision is meant to preserve and balance the separate institutional interests of courts and executive agencies. The *Chenery* doctrine protects the respective powers of each branch and, ultimately, the rule of law itself. *See Church of Scientology of Cal. v. I.R..S.*, 792 F.2d 153, 165 (D.C. Cir. 1986)(Silberman concurring).

351 F.3d 717, 728-29 (6th Cir. 2003); *Georgis v. Ashcroft* 328 F.3d 962, 967 (7th Cir. 2003); *Loulou v. Ashcroft*, 35(F.3d 706, 708 (8th Cir. 2003); *Carriche v. Ashcroft*, 35(F.3d 845, 850-51 (9th Cir. 2003); *Yuk v. Ashcroft*, 335 F.3(1222 (10th Cir. 2004); *Gonzalez-Oropeza v. U.S. Attorne; General*, 321 F.3d 1331, 1333 (11th Cir. 2003).

e. Aliens have also challenged BIA application of th(AWO regulation, most notably in certain recurrent scenario; where the regulation's secrecy impedes or threatens to distor judicial review in ways not contemplated by *Albathani*'; functional analysis. The first scenario is what the Fifth Circuit termed a "jurisdictional conundrum." A jurisdictional conundrum arises when the BIA affirms an IJ without opinion, but the IJ's opinion rests upon two alternative rationales, one of which is subject to judicial review and the other not. *Zhu v. Ashcroft*, 382 F.3d 521, 526-27 (5th Cir. 2004)("there is a jurisdictional conundrum; that is, this Court has no way of knowing whether the Board affirmed the IJ's decision on a non-reviewable basis, i.e. untimeliness, or a reviewable basis, i.e. the merits of Zhu's asylum claim."); *Haoud v. Ashcroft*, 350 F.3d 201, 206 (1st Cir. 2003)(same); *Ngure v. Ashcroft*, 367 F.3d at 980-82.[5] Because an AWO order only affirms the IJ's result, the reviewing court is left to ponder fruitlessly whether the BIA's undisclosed decision might have rejected one or the other of the IJ's alternative rationales and thus altered the court's jurisdiction over the case.

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[5] In each of these three cases the IJ denied the alien's asylum application on the same two alternative grounds, the first being that the application was untimely, a question that is not reviewable under 8 U.S.C. § 1158(a)(3), and the second being a negative assessment of the merits of the persecution claim, a question that is reviewable under 8 U.S.C. § 1252(a)(2)(B)(ii).

A second problematic scenario arises when the IJ has interpreted an ambiguous immigration statute in the absence of any controlling BIA precedent, and yet the BIA affirms the IJ without opinion. Should the circuit court extend *Chevron* deference to the IJ's statutory interpretation even though the BIA has stated that it may well have rejected the IJ's interpretation? *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984). If *Chevron* deference is not possible, do *Chenery*, *Ventura*, and *Thomas* require remand? Or should the court go ahead and review the IJ's statutory interpretation under a less deferential standard? *See Smriko v. Ashcroft*, 387 F.3d 279, 289 (3d Cir. 2004)(questioning whether IJ interpretations of ambiguous immigration statutes, if affirmed without opinion, are due *Chevron* deference); *Shi Liang Lin v. Gonzales*, 416 F.3d 184, 191 (2d Cir. 2005)(declining to extend *Chevron* deference to IJ statutory interpretation affirmed by AWO order). The obstacles to judicial review are even greater in this scenario if the IJ who applies the ambiguous immigration statute fails to meaningfully analyze and explain its terms, such that the reviewing court is left with an opinion that contains no clear agency position about the meaning of the statute. *See Smriko*, 387 F.3d at 289; *Berishaj v. Ashcroft*, 378 F.3d 314, 327 (3d Cir. 2004); *Loeza-Dominguez v. Gonzales,* 428 F.3d at 1158.

f. Aliens have argued that the BIA violates the terms of the AWO regulation when it affirms an IJ without opinion in these and other problematic scenarios, and they have asked circuit courts to correct such misapplication by ordering remand for clarification of the BIA decision. In response, the Attorney General, citing *Heckler v. Chaney*; *I.C.C. v. Locomotive Engineers*, 482 U.S. 270 (1987); and other precedents of this Court, has argued that the decision whether to apply AWO procedures in any particular case is wholly

committed to agency discretion under the APA, 5 U.S.C § 701(a)(2), and is never subject to judicial review. *Haoud v. Ashcroft*, 350 F.3d at 206; *Zhu v. Ashcroft*, 382 F.3d at 526-27; *Smriko v. Ashcroft*, 387 F.3d at 290; *Hamdan v. Gonzales*, 425 F. 3d 1051, 1058 (7th Cir. 2005); *Ngure v. Ashcroft*, 367 F.3d at 981; *Chen v. Ashcroft*, 378 F.3d at 1086-88; *Tsegay v. Ashcroft*, 386 F.3d at 1355-58.

g. In the first "jurisdictional conundrum" case, *Haoud v. Ashcroft*, the First Circuit rejected the Attorney General's efforts to equate BIA application of the AWO regulation with the FDA's decision in *Heckler* not to undertake enforcement action. The court noted that specific, mandatory criteria guide the BIA through the each step of the AWO process:

> [T]he Board's own regulation provides more than enough 'law' by which a court could review the Board's decision ... Especially when the Board's review of an IJ's decision often hinges on Circuit court precedent, we are well-equipped, both statutorily and practically, to review a decision to streamline.

Haoud, 350 F.3d at 206. The First Circuit remanded, finding that the BIA had misapplied the AWO regulation in Haoud's case because the AWO order prevented the court from determining its jurisdiction. *Id.* The Fifth Circuit followed

Haoud's logic and remanded an identical jurisdictional conundrum case in *Zhu v. Ashcroft* 382 F.3d at 526-27.[6]

h. The Eighth Circuit decided *Ngure v. Ashcroft* after *Haoud*. The AWO order in *Ngure* created a jurisdictional conundrum identical to the ones remanded in both *Haoud* and *Zhu*. The Eighth Circuit did not remand, but instead rejected *Haoud's* reasoning and accepted the Attorney General's position that BIA decisions to apply AWO procedures are unreviewable matters committed to agency discretion by law. *Ngure*, 367 F.3d at 982-88.

The Eighth Circuit deemed especially significant the fact that the AWO process is regulatory and that no statute provides courts with the requisite "law to apply." 367 F.3d at 982. *Ngure* acknowledged this Court's precedents establishing that an agency's failure to follow its own regulations can be challenged under the APA. *Id.* at 981 (citing *Webster v. Doe*, 486 U.S. 592, 602 n.7 (1988); *Vitarelli v. Seaton*, 359 U.S. 535, 539-40 (1959); *Service v. Dulles*, 354 U.S. 363, 372 (1957)). However, *Ngure* characterized the presumption that formal regulations are enforceable against agencies as a limited one, applicable only "in certain contexts" where "the regulations impose binding norms on the agency." 367 F.3d at 982 (citing *Vitarelli*, 359 U.S. at 539-40; *Dulles*, 354 U.S. at 372). The court noted that where a procedural rule is designed primarily to benefit the agency in carrying out its functions, judicial review may

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[6] The First Circuit in *Haoud* also justified its remand in light of the fact that the BIA had issued a decision addressing a case nearly identical to Haoud's, but reaching the opposite result, during the period in which Haoud's own BIA appeal was pending. 350 F.3d at 207. The BIA issued an AWO order even though Haoud had raised the intervening BIA decision in his appeal. *Id.* The Fifth Circuit's remand in *Zhu* was based on the jurisdictional conundrum alone. 382 F.3d at 526-27.

be circumscribed. *Ngure*, 367 F.3d at 983 (citing *Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 538-39 (1970). *Ngure* explained that a regulation will impose binding norms upon an agency largely to the extent that the agency itself intends to be so bound. As authority for this proposition *Ngure* quoted *Padula v. Webster*, 822 F.2d 97, 100 (D.C. Cir. 1987):

> As a general rule, an agency pronouncement is transformed into a binding norm if so intended by the agency[,] and agency intent, in turn, is ascertained by an examination of the statement's language, the context, and any available extrinsic evidence.

Ngure, 367 F.3d at 982 (quoting *Padula*; emphasis added).[7]

The Eighth Circuit went on to outline three reasons why BIA application of the AWO regulation is committed to agency discretion and not subject to judicial review. The first was the court's view that the regulation is an internal agency decision primarily concerned with "how to allocate its scarce resources." *Ngure,* 367 F.3d at 983. Second, the court's "review of the text, structure and history" of the regulation led it to conclude the Attorney General did not intend to confer important procedural benefits upon individuals but instead meant "to provide BIA members with a mechanism to use their scarce resources efficiently as they carr[y] out the Attorney General's responsibility to enforce the immigration laws." *Id.* at 983-84. The *Ngure* panel's third reason for

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[7] This is a notable extension of *Padula's* logic because that case did not involve a formally promulgated regulation. *Padula* considered a suit brought by a homosexual who applied for but was denied employment at the FBI. 822 F.2d at 100-01. Padula sued for the job asserting the FBI had failed to hire her solely because of her homosexual status, and she claimed the FBI's actions violated binding internal policy. 822 F.2d at 100. The FBI had never adopted any internal non-discrimination policy concerning homosexuals, let alone undertaken formal rulemaking on the issue. Padula instead attempted to establish that a binding policy arose from a handful of letters the FBI had written to various law schools to assuage concerns the FBI might discriminate against homosexual law student applicants during on-campus interviews. *Id.* The D.C. Circuit gave Padula's argument serious consideration and conceded that "[t]he more than a dozen FBI letters to law schools involved here might well be sufficient to establish a binding policy if they in fact limited the Bureau's discretion." *Id.* Ultimately the court found the letters might have but did not bind the FBI to any policy of non-discrimination, because they stated the agency would take homosexual conduct into account when hiring, and that because of this factor no homosexual would be likely meet the agency's hiring criteria. *Id.*

concluding that application of the AWO regulation i committed to agency discretion was that "it is not possible t devise a meaningful and adequate standard of review" for th specific judgments a BIA member must make under th regulation when deciding whether to issue an AWO order 367 F.3d at 985. In particular, the court found that a BI member's determination under 8 C.F.R. § 1003.1(e)(4)(i)(B that "the factual and legal issues raised on appeal are not s substantial that the case warrants the issuance of a writte opinion" is not a judgment about whether the case presents substantial question of law or fact in the abstract sense, bu instead is "necessarily a function of the BIA's limite resources at a particular point in time" and involves the Boar member's expert judgment about whether the immigratio laws would be enhanced by publishing an opinion. *Id.* at 985-87.

i. On October 26, 2004, the Tenth Circuit published an opinion following *Ngure* and holding that BIA application of the AWO regulation is committed to agency discretion under the APA. *Tsegay v. Ashcroft*, 386 F.3d at 1355-58. That same day the Third Circuit published an opinion thoroughly rejecting *Ngure*'s reasoning on the same point. *Smriko v. Ashcroft*, 387 F.3d at 292-97. *Smriko* presented the legal question whether an alien who holds refugee status automatically loses that status upon adjusting to permanent residency status, or whether, alternatively, refugee status survives an alien's adjustment to permanent residency so as to afford the alien additional protections as a refugee if he is later placed in deportation proceedings. 387 F.3d at 281-88. Answering this question required interpretation of ambiguous immigration statutes. *Id.* Smriko offered plausible interpretations of these statutes to the IJ who presided over his removal hearing, arguing that his own refugee status did survive his adjustment to permanent residency. *Id.* The IJ

rejected Smriko's arguments in a terse opinion that provided almost no analysis of the relevant statutes. *Id.* at 288. The BIA then affirmed the IJ without opinion despite the fact that no controlling Board precedents addressed the statutory questions raised in Smriko's appeal. Smriko's petition for review to the Third Circuit repeated his statutory arguments and sought remand on the ground the BIA had misapplied the AWO regulation to his case. 387 F.3d at 289. The Attorney General argued the application of the regulation is committed to agency discretion. *Id.*

The Third Circuit held that it could review BIA application of the AWO regulation and rebutted each of *Ngure's* holdings. *Smriko*, 387 F.3d at 292-97. *Smriko* criticized the Eighth Circuit's assumptions about the importance of agency intent and rejected the application of *Padula v. Webster* to formal agency regulations:

> This use of agency "intent" in promulgating regulations would seem to turn on its head the "basic presumption of judicial review" embodied in the APA, *Lincoln*, 508 U.S. at 190, the maxim that agency regulations "have the force of law," *Marshall v. Lansing*, 839 F.2d 933, 943 (3d Cir. 1988), and the requirement that "regulations validly prescribed by a government administrator are binding upon him as well as the citizen," *Service v. Dulles*, 354 U.S. 363, 372 (1957). *See Vitarelli v. Seaton*, 359 U.S. 535, 539-40 (1959) (applying *Dulles*); *see also Webster v. Doe*, 486 U.S. 592, 602 n.7 (1988) ("[an] Agency's failure to follow its own regulations can be challenged under the APA"). If we routinely begin to look to an agency's intent (with respect to whether its own compliance with its regulations should be subject to judicial review) in promulgating regulations, as *Ngure*

> would have us do, we may well find that agencies *never* desire judicial review, and would rather be left unchecked in the exercise of their powers.

Smriko 387 F.3d at 295. Further, the *Smriko* panel observed that even if agency intent were a relevant consideration, the BIA's regulations actually state that "[t]he Board shall be governed by the provisions and limitations prescribed by applicable law, regulations, and procedures." 8 C.F.R. § 1003.1(d)(1)(i). The Third Circuit was unpersuaded by the claim that the specific criteria of the AWO regulation do not provide manageable standards for judicial review, since they are all mandatory. In particular, *Smriko* rejected *Ngure*'s interpretation of the "not so substantial" criterion at 8 C.F.R. § 1003.1(e)(4)(i)(B):

> These criteria are clearly intended to require the single BIA member to determine whether the correct outcome was reached and, if so, whether a Board opinion would have significant value in the context of an appeal of the matter or in the context of other matters yet to be adjudicated ... they have nothing to do with the BIA's caseload or other internal circumstances... The government's insistence that §1003.1(e)(4)(i) requires a single BIA member to assess the availability of agency resources is based upon subsection B and its reference to whether the "issues raised upon appeal are not so substantial that the case warrants the issuance of a written opinion," *id.* § 1003.1(e)(4)(i)(B). However, this language focuses upon the lack of importance of the issues, not backlog and the availability of resources to produce an opinion.

Smriko, 387 F.3d at 292 (citations and internal quotation marks omitted). The Third Circuit also found *Ngure*'s analysis of *Heckler* lacking in that it failed to acknowledge this Court's distinction between agency decisions not to act, which by their nature do not involve coercive use of government power, and affirmative agency actions taken pursuant to law, which will be more likely to "infringe upon areas that courts often are called upon to protect." *Smriko*, 387 F.3d at 292 n.8 (quoting *Heckler*, 470 U.S. at 832).

Determining that it could review the BIA's application of the AWO regulation, the Third Circuit, citing its duties under *Chevron*, held that where an alien presents a plausible interpretation of an ambiguous immigration statute in the absence of controlling agency precedent, the BIA will abuse its discretion if it affirms without opinion, and the court must remand to allow the agency to decide an important unresolved question of statutory interpretation in the first instance. *Smriko*, 387 F.3d at 297. Doing otherwise would "usurp" the agency's function and result in circuit courts "building case law that is fashioned without the benefit of agency expertise." *Id.* *Smriko* noted other problematic scenarios caused by misapplication of the AWO regulation, including the "jurisdictional conundrum" in *Haoud* and *Zhu*, then concluded:

> It is foreseeable that there will be a number of situations like the one before us in which an arbitrary and capricious decision to streamline will hold the potential for distorting the judicial review that both the regulations and Congress contemplated. When that is the case, a remand for further BIA proceedings is appropriate.

Smriko, 387 F.3d at 297. On remand, the BIA ended up issuing an important precedential decision, *Smriko*, 23 I&N Dec. 836 (BIA 2005).[8]

2. Proceedings below

a. Sergio Loeza-Dominguez is an undocumented Mexican immigrant who entered the United States in 1991. He is a seriously disabled man, an amputee with only one arm. App. 28. Until his removal in March of 2006 he was living in Minnesota with his family which included a step-son, and two U.S. citizen children. App. 23, 31. Mr. Loeza-Dominguez's U.S. citizen daughter suffers from speech delays and requires the services of a speech pathologist. App. 23-26. When immigration authorities placed Mr. Loeza-Dominguez in removal proceedings, he conceded being removable, but applied to the IJ for a special form of humanitarian immigration relief called Cancellation of Removal. 8 U.S.C. § 1229A(b)(1). App. 10a. To qualify for Cancellation of Removal an alien must demonstrate (a) at least 10 years of continuous physical presence in the U.S., (b) good moral character during that 10-year period, (c) a lack of certain disqualifying criminal convictions, and (d) that removal would result in "exceptional and extremely unusual hardship" to the alien's U.S. citizen or lawful permanent resident child, spouse, or parent. App. 11.

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[8] A senior judge of the Eighth Circuit, Donald Lay, sat by designation on the *Smriko* panel and issued a concurring opinion rejecting *Ngure*. 387 F.3d at 297. Judge Lay later issued a concurring opinion in a published Eighth Circuit decision stating that *Ngure* "is ill-reasoned and should be overturned." *Begna v. Ashcroft*, 392 F.3d 301, 305 (8th Cir. 2005)(Lay, J., concurring).

b. Mr. Loeza-Dominguez had a single criminal conviction for "malicious punishment of a child" under Minn. Stat. 609.377, this the result of an incident in which he disciplined his step-son for swearing at school by spanking the boy on the buttocks and leg with the cord of an iron. App. 31-34. Minn. Stat. 609.377 has seven subsections and is divisible into a myriad of offenses ranging across a wide spectrum of seriousness. App. 35-36. On one end of the spectrum the statute may penalize a parent's single, well-intentioned act of corporeal punishment where that punishment causes the child only pain or slight injury (such as a welt or bruise) but is nonetheless judged unreasonable and excessive relative to norms of child discipline prevailing in Minnesota. *Id.* On the other end of the spectrum, the statute may punish a non-parental caretaker's repeated and intentionally cruel assaults that are so severe that they carry a high probability of killing or permanently disabling the child. *Id.* When laying the factual basis for Mr. Loeza-Dominguez's guilty plea, his attorney elicited the following testimony (App. 30-32):

Q: You got a call from school indicating that he had done some things in school that had been continuous in nature; is that correct?
A: Um-hm.
Q: Yes?
THE COURT: Use words.
THE DEFENDANT: Yes.
BY MR. SUTCLIFFE:
Q: And at that time you became angry and disciplined him; is that correct?
A: Yep.
Q: All right. What did you use to discipline him?
A: Well, iron cord.

Q: The cord?
A: Yeah.
Q: It was the cord from an iron?
A: Yeah.
Q: And you hit him on the back?
A: Well – yeah, just one.
Q: Okay.
A: And it went on his leg.
Q: And on the leg also?
A: (Witness nodded head.)
Q: **Do you agree that that was excessive? Under the circumstances, that that was too much to do? *Do you realize now* that that was not the correct thing to do?**
A: **Well, it wasn't the correct thing to do, yeah.**
Q: **And you understand that that kind of punishment is against the law in the State of Minnesota?**
A: **Yes.**

(emphasis added). Mr. Loeza-Dominguez received a minimal 60-day sentence and was permitted to spend all but 20-days of it at home with his family (including his step-son) while on electronic home monitoring. App. 33-34.

c. Over Mr. Loeza-Dominguez's objections, the IJ ruled that a conviction for "malicious punishment of a child" under Minn Stat 609.377 necessarily constitutes both a "crime of child abuse" for purposes of the deportation statute, 8 U.S.C § 1227(a)(2)(E)(i), and a "crime involving moral turpitude" under 8 U.S.C. § 1227(a)(2)(A)(i). App. 10-14. Accordingly, the IJ held that Mr. Loeza-Dominguez was disqualified from applying for Cancellation of Removal by U.S.C. § 1229A(b)(1)(C). *Id.* The IJ's opinion offered no elaboration of the statutory term "a crime of child abuse,"

and attempted no analysis of the text of Minn. Stat. 609.377. Id. Nowhere in her opinion did the IJ acknowledge that Minn. Stat. 609.377 is a complex, divisible statute. *Id.* The IJ never cited to a any BIA or judicial authorities, and she did little more than point to the bare texts of Minn. Stat. 609.377, 8 U.S.C. § 1227(a)(2)(E)(i), and 8 U.S.C. § 1227(a)(2)(A)(i). *Id.* The IJ did not meaningfully address Mr. Loeza-Dominguez's arguments that his conviction could not meet the definition of "child abuse" found at 42 U.S.C. §13031(c)(1), and that this independent federal definition was the best guide for interpreting the term "crime of child abuse" at 8 U.S.C. § 1227(a)(2)(E)(i). App.12, Admin. Rec. 74-81.

d. Mr. Loeza-Dominguez appealed his removal order to the BIA where he presented highly plausible, detailed arguments that his conviction constituted neither a "crime of child abuse" nor a "crime involving moral turpitude." Admin. Rec. 8-16. In the appeal brief he explicitly asked the BIA not to issue an AWO order in his case, stating "'Child abuse' has not been defined in the context of INA Section 237(a)(2)(E). Nor has a conviction for "child abuse" been presented as a crime involving moral turpitude. This matter presents legal issues which the Board has not addressed before and is therefore not appropriate for summary affirmance without opinion." Admin. Rec. 15. The BIA did affirm the IJ without opinion. App. 8. The BIA has never rendered any holding regarding the scope of "a crime of child abuse" in any precedential opinion. The BIA has never considered whether a Minnesota conviction for "malicious punishment of a child" is necessarily a crime involving moral turpitude.

e. In his petition for review to the Eighth Circuit[9], Mr.

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[9] The Eighth Circuit had jurisdiction over the appeal under 8 U.S.C. §1252.

Loeza-Dominguez argued that the BIA had misapplied th AWO regulation in his case because the Board had neve issued a precedential decision answering the important an novel legal questions he raised in the administrative appeal Mr. Loeza-Dominguez asked the Eighth Circuit to remand hi case back to the BIA. App. 7.

f. The Eighth Circuit held that Mr. Loeza-Dominguez' arguments against the BIA's decision to issue an AWO orde were precluded by *Ngure* (App. 7.), and proceeded to th unanswered question whether a Minnesota conviction fo "malicious punishment of a child" constitutes a "crime o violence" under 8 U.S.C. § 1227(a)(2)(E)(i). App. 4-7. The court acknowledged that the "administrative [IJ] decision did not specify the definition of 'child abuse' applied in this case." App. 5. Lacking any agency answer to the legal question under review, the panel turned to a post hoc argument in the Attorney General's brief that cited the BIA decision *In re Rodriguez-Rodriguez*, 22 I&N Dec. 991 (BIA 1999). App. 5, 15-17. Neither the IJ nor the BIA had ever mentioned *Rodriguez-Rodriguez*. No party had ever cited or mentioned *Rodriguez-Rodriguez* before the IJ or BIA. This is not surprising because *Rodriguez-Rodriguez* did not concern the "crime of child abuse" statute at issue but rather addressed an entirely separate question of whether a Texas crime for indecent exposure constituted "sexual abuse of a minor" under 8 U.S.C. § 1101(a)(43)(A). 22 I&N Dec. at 991- 92. App. 18-21.

The Attorney General's brief to the Eighth Circuit raised *Rodriguez-Rodriguez* because it contains two sentences of dicta about the "crime of child abuse" statute. App. 15-21. Counsel for the Attorney General took care both in his brief to the Eighth Circuit and during oral arguments not to mischaracterize this dictum as a BIA holding. App. 15-17.[10] The brief stated:

> The term "child abuse" is not defined in the statute. As the BIA has noted:
>
> > in including child abuse as a ground of removal in section 237(a)(2)(E)(i) of the Act, Congress likewise did not refer to a particular statutory definition, although in the same section it did designate a statutory definition for the term 'crime of domestic violence.' By its common usage, 'child abuse' encompasses actions or inactions that also do not require physical contact. See Blacks Law Dictionary [(6th ed. 1990)] supra, at 239 (defining child abuse as '(a)ny form of cruelty to a child's physical, moral or mental well-being').
>
> In Re Rodriguez Rodriguez, 22 I. & N. Dec. 991, 996 (BIA 1999)

App. 15-16. The Eighth Circuit alchemized the dicta of *Rodriguez-Rodriguez* into the needed agency precedent, even seeking out and then citing an unpublished and uncitable BIA decision that also mentioned *Rodriguez-Rodriguez*. *Loeza-*

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[10] The oral arguments are available at www.ca8.uscourts.gov/ by clicking on "one-stop search" and entering case number 04-3364.

Dominguez, 428 F.3d at 1158 (citing *In Re Manzano Hernandez*, 2005 WL 698392 (B.I.A. 2005). App 5. In a compounded error the *Loeza-Dominguez* panel reasoned:

> [a]lthough the administrative decision did not specify the definition of 'child abuse' applied in this case, an IJ is bound to apply the BIA's precedent defining 'child abuse,' 8 C.F.R. § 1003.1(g), and we therefore review the decision in this case to determine whether Loeza-Dominguez's prior offense falls within the common definition previously adopted by the BIA.

428 F.3d at 1158. The *Loeza-Dominguez* panel thus fictitiously pasted into the IJ's decision a dictionary definition of "child abuse" ("any form of cruelty to a child's physical, moral or mental well-being") that it had cut from dicta in *Rodriguez-Rodriguez*, and then proceeded to review the IJ's decision as if the IJ had in fact applied that definition and as if that definition were in fact the BIA's authoritative holding on the issue.

g. Mr. Loeza-Dominguez filed a timely petition for rehearing and rehearing en banc which the Eighth Circuit denied on February 7, 2006. A judicial stay of removal that had been in place was then vacated, and weeks later U.S. Immigration and Customs Enforcement officials removed Mr. Loeza-Dominguez to Mexico.

REASONS FOR GRANTING THE PETITION

The courts of appeals are intractably divided over whether they may review and correct BIA misapplication of the AWO regulation. The disagreement is fundamental and carries profound implications for judicial review not only in the immigration arena, but in other administrative contexts too.

Smriko's critique of *Ngure* reflects a basic disagreement about the proper relationship of courts to administrative agencies and the extent to which courts may hold agencies accountable to the terms of the regulations they promulgate. The full Eighth Circuit court has refused requests for rehearing on the issue several times, including in the instant case.

The decision of the Eighth Circuit usurps the Executive Branch's statutorily assigned role in interpreting and enforcing the immigration laws and it badly distorts the court's relationship to the agency. The instant case is one of the "foreseeable situations" that *Smriko* described, a situation where the BIA's arbitrary and capricious decision to issue an AWO order made remand absolutely necessary, but where the Eighth Circuit's adherence to *Ngure* ended up "distorting the judicial review that both the regulations and Congress contemplated." *Smriko,* 387 F.3d at 297. *Loeza-Dominguez* presents the very same problem seen in *Smriko*. Like Mr. Smriko, Sergio Loeza-Dominguez also raised legal questions before the IJ whose resolution required interpretation of ambiguous immigration statutes not yet construed in any controlling BIA precedent. Here too the IJ's decision lacked meaningful analysis of the relevant statutes. Despite Mr. Loeza-Dominguez's explicit pleas that the BIA not affirm the inadequate IJ decision without opinion, the BIA did just that. Mr. Loeza-Dominguez then asked the Eighth Circuit to remand because the BIA had misapplied the AWO regulation and it needed to provide a reviewable agency interpretation of the statute. If this case had been decided in the Third Circuit, Mr. Loeza-Dominguez would have won remand. Instead, the Eighth Circuit applied *Ngure*, usurped the BIA's role, and published a binding decision construing the immigration statute in the first instance without the benefit of agency expertise.

The Eighth Circuit's adherence to *Ngure* guarantees tha it will continue to violate fundamental principles o administrative law in AWO cases, including this Court's remand rule. *S.E.C. v. Chenery Corp.*, 332 U.S. 194 (1947) *INS v. Ventura*, 537 U.S. 12 (2002), and *Thomas v Gonzales*, 547 U.S. ___ (2006).

The circuit split results in profound confusion about the *Chevron* doctrine in AWO cases. The Eighth Circuit assumes that it must give *Chevron* deference to IJ opinions affirmed by AWO orders, even when they present jurisdictional conundrums, while other circuits may remand identical cases or review them applying varying levels of deference. Even the Justice Department has acknowledged to this Court that conundrum cases like *Ngure* are problematic. In two separate briefs filed with the Supreme Court last year, the Solicitor General conceded the AWO process creates jurisdictional conundrums.[11] The Solicitor General told the Supreme Court that using the AWO procedure in such cases can impact the review authority of circuit courts. By acknowledging that the AWO regulation generates jurisdictional conundrums, the Justice Department has implicitly rejected *Ngure* and fully concedes the most fundamental point: in AWO cases the IJ opinion is <u>not</u> "the final agency determination." The very possibility of a judicial conundrum logically entails both that (1) the BIA may indeed render a secret decision in AWO cases that is substantively different from the IJ opinion, and (2) the substantive differences contained in the BIA's secret

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[11] *Aleru v. Gonzales*, Sup. Ct. File 04-670, Brief in Opp. at 14-15, 20-21(filed February 18, 2005)(cert. denied March 21, 2005)); *Kebede v. Gonzales*, Sup. Ct. File 04-280, Brief in Opp. at 19-20 (filed February 22, 2005)(cert. denied March 28, 2005). *Aleru* sought review of the Eighth Circuit's unpublished decision, *Aleru v. Ashcroft*, No. 03-2449 (June 30, 2004)(rehearing denied, August 19, 2004).

decision have legal consequences independent of the IJ opinion -- including consequences for federal court jurisdiction. If the IJ's opinion were truly "the final agency determination," courts would not have to ponder whether and how the BIA's secret decision, if only revealed, might change the court's analysis of its own jurisdiction. With its concession, the government's position is necessarily reduced to this: 'yes, the AWO process is a process of secret agency decision-making, but it is a manageably secret process of agency decision-making.' Mr. Loeza-Dominguez rejects that an explicitly secret administrative process like the AWO is manageable given the duties that *Chenery* and *Chevron* place on courts. The AWO scheme is extraordinary and idiosyncratic because its secrecy impedes informed appellate review in many of (and perhaps even all) its applications. It is at least as aberrant as the system of administrative review the Supreme Court so vigorously rejected last term in *Ballard v. Commissioner*. 125 S. Ct. 1270 (2005).

Finally, the petition should be granted because the result below was incorrect and manifestly unjust. Even if the Eighth Circuit's post hoc, dictionary definition of "a crime of child abuse" were legitimate ("any form of cruelty to a child's physical, moral or mental well-being"), it is clear that the statute under which Mr. Loeza-Dominguez was convicted encompasses some offenses that do involve cruelty and others that do not. Minn Stat 609.377 is divisible and can punish intentional acts that involve "unreasonable force OR cruel discipline." The record indicates Mr. Loeza-Dominguez used unreasonable force under the circumstances, not cruel discipline, when he spanked his stepson. As for "moral turpitude," the ground the Eighth Circuit did not reach, again the statute is divisible and it seems clear that when Mr. Loeza-Dominguez's spanked his step-son his particular offense under the statute involved an "unreasonable" use of

force, not "conduct which is inherently base, vile, o depraved ... and per se morally reprehenisible an intrinsically wrong." *Matter of Franklin*, 20 I&N Dec. 867 868 (BIA 1994).

CONCLUSION

For the foregoing reasons, the petition for review shoul be granted.

Respectfully submitted,

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May 8, 2006

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 04-3364

[Filed February 7, 2006]

Sergio Loeza-Dominguez,	)
Petitioner,	)
	)
v.	)
	)
Alberto Gonzales,	)
Attorney General of the United States,	)
Respondent.	)
	)

Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Murphy did not participate in the consideration or decision of this matter.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 04-3364

[Filed November 17, 2005]

Sergio Loeza-Dominguez,	)
Petitioner,	)
	)
v.	)
	)
Alberto Gonzales,	)
Attorney General of the United States,[1]	)
Respondent.	)
	)

On Appeal From
Petition for Review of an Order of the
Board of Immigration Appeals

Before RILEY, FAGG, and COLLOTON, Circuit Judges.

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[1] Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Alberto Gonzales is substituted automatically for his predecessor, John Ashcroft, as respondent.

OPINION

COLLOTON, Circuit Judge.

Sergio Loeza-Dominguez petitions for review of the denial of his application for cancellation of removal and adjustment of status pursuant to 8 U.S.C. § 1229b. We deny the petition for review.

Loeza-Dominguez, a native and citizen of Mexico, entered the United States without inspection in September 1991. During the next decade, throughout which he continuously resided in the United States, Loeza-Dominguez married, became a stepparent, and fathered two children. In May 2002, after admitting to striking his nine-year-old stepson on the back and leg with an electrical cord, Loeza-Dominguez pled guilty to malicious punishment of a child in violation of Minn. Stat. § 609.377.

In June 2002, Loeza-Dominguez was charged with being removable under the Immigration and Nationality Act ("INA") as an alien who is present in the United States without being admitted or paroled. 8 U.S.C. § 1182(a)(6)(A)(I). He conceded that he was removable, but applied for cancellation of removal and adjustment of status, as well as for voluntary departure. Under the INA, a nonpermanent resident alien is ineligible for cancellation of removal if he has been convicted of certain offenses, including "crimes involving moral turpitude," *see id.* § 1227(a)(2)(A)(I), and crimes of "domestic violence" or "child abuse, child neglect, or child abandonment." *See id.* § 1227(a)(2)(E)(I); *see also id.* § 1229b(b)(1)(C). In denying his application for cancellation of removal, the IJ found that Loeza-Dominguez's conviction for malicious punishment of a child was both a crime involving moral turpitude and a

crime of child abuse, rendering him ineligible fo cancellation. The BIA affirmed without opinion. *See* 8 C.F.R § 1003.1(e)(4).

Loeza-Dominguez contends that his offense meets neithe definition and that he was therefore eligible for cancellatio of removal. We have jurisdiction under the recently enacte "REAL ID Act" to consider the legal question whether th state court conviction meets the definition of "child abuse" o "crime of moral turpitude." *See* Pub. L. No. 109-13, § 10 (2005); 8 U.S.C. § 1252(a)(2)(D); *Lopez v. Gonzales*, 41 F.3d 934, 936 (8th Cir. 2005).

The term "child abuse" is not defined in the INA, and while there is no doubt that certain violence against children qualifies under any possible definition of "child abuse," the outer limits of the term in this statute are unclear. When confronted with an ambiguous statutory term, the BIA has discretion to arrive at an interpretation that is reasonable, and we accord substantial deference to its interpretations of the statutes that it administers. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425, 119 S. Ct. 1439, 143 L. Ed. 2d 590 (1999); *Regalado-Garcia v. INS*, 305 F.3d 784, 787 (8th Cir. 2002). It is true, as Loeza-Dominguez points out, that Congress has defined "child abuse" for the purpose of federal child abuse reporting requirements in another part of the United States Code, 42 U.S.C. § 13031(c)(1), but the BIA is not bound to apply the same definition for the much different purpose of determining which aliens are ineligible for cancellation of removal. Congress has not spoken to the precise question at issue in the immigration area, so we examine the BIA's approach to determine whether it is rational and consistent with the statute. *See Sullivan v. Everhart*, 494 U.S. 83, 89, 110 S. Ct. 960, 108 L. Ed. 2d 72 (1990).

The BIA has given "child abuse" in § 1227(a)(2)(E) a relatively broad construction, applying "common usage" and citing the *Black's Law Dictionary* definition of "child abuse" as "any form of cruelty to a child's physical, moral, or mental well-being." *See In re Rodriguez-Rodriguez*, 22 I. & N. Dec. 991, 996 (B.I.A. 1999). In *Rodriguez-Rodriguez*, the BIA concluded that "child abuse," like the term "sexual abuse of a minor," 8 U.S.C. § 1227(a)(2), § 1101(a)(43)(A), encompasses actions or inactions that do not require physical contact with a child. *See also In re Manzano-Hernandez*, 2005 WL 698392 (B.I.A. 2005) (unpublished) ("We have held that the term 'crime of child abuse' appearing in section 237(a)(2)(E)(I) cannot reasonably be interpreted as defining any discrete offense; on the contrary, we have indicated that it refers to 'any form of cruelty to a child's physical, moral, or mental well-being.'") (quoting *Rodriguez-Rodriguez*, 22 I. & N. Dec. at 996) (alteration in original). We see no basis to conclude that the BIA acted unreasonably in employing this common legal definition of "child abuse." Although the administrative decision did not specify the definition of "child abuse" applied in this case, an IJ is bound to apply the BIA's precedent defining "child abuse," 8 C.F.R. § 1003.1(g), and we therefore review the decision in this case to determine whether Loeza-Dominguez's prior offense falls within the common definition previously adopted by the BIA.

Under Minnesota law, malicious punishment of a child occurs whenever a parent, legal guardian, or caretaker, "by an intentional act or a series of intentional acts with respect to a child, evidences unreasonable force or cruel discipline that is excessive under the circumstances." Minn. Stat. § 609.377, subd. 1. Loeza-Dominguez contends that his conviction under this statute cannot reasonably be considered "child abuse," because the statute does not require an element of physical injury. We have said already that we think it was reasonable

for the BIA to adopt a definition of child abuse that include some acts that do not result in physical injury. Nonetheless Loeza-Dominguez suggests that if the Minnesota courts apply the state criminal statute broadly, some convictions will be outside the scope of "child abuse" under the federa immigration statute.

Even indulging the unlikely assumption that Minnesot might define "malicious punishment of a child" to encompass acts that do not constitute a "form of cruelty to a child's physical, moral, or mental well-being," that circumstance would not exclude *all* convictions under the Minnesota statute from the scope of "child abuse." At most, it would render the Minnesota statute divisible - that is, some violations would be "child abuse" under the federal statute, while others would not. *See In re Vargas-Sarmiento*, 23 I. & N. Dec. 651, 654 (B.I.A. 2004) ("Where a statute encompasses some acts that are grounds for removal and others that are not, it is considered to be divisible."); *cf. Chanmouny v. Ashcroft*, 376 F.3d 810, 812 (8th Cir. 2004). In that event, we look to the record of conviction to determine whether the alien was convicted under the part of the statute that meets the definition of child abuse. *Id.* at 813. The record of conviction for this purpose typically includes the charging document and the guilty plea proceeding, *id.*, both of which are part of the administrative record here.

In Loeza-Dominguez's prior criminal case, the complaint alleged that he repeatedly struck his stepson on the back and legs with the electrical cord from an iron, and Loeza-Dominguez admitted as much during his plea hearing. (A.R. at 158, 173). The complaint further alleged that the child suffered physical injuries, including "two long, red, circular marks," and a large bruise on his thigh. (A.R. at 173). A reasonable adjudicator easily could conclude that this conduct

was a form of cruelty to the child's physical, moral or mental well-being, and thus constituted child abuse as defined by the BIA.

Because we hold that the IJ permissibly concluded that Loeza-Dominguez sustained a conviction for a crime of "child abuse," we need not reach the alternative holding that he also was convicted of a crime involving moral turpitude. We lack jurisdiction to consider Loeza-Dominguez's contention that his case was inappropriate for affirmance without opinion by the BIA. *Ngure v. Ashcroft*, 367 F.3d 975, 983 (8th Cir. 2004).

The petition for review is denied.

APPENDIX C

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

File: A95-205-192 - BLOOMINGTON

[Filed September 9, 2004]

In Re:	)
	)
LOEZA-DOMINGUEZ, SERGIO	)
	)

IN REMOVAL PROCEEDINGS
APPEAL
DECISION OF THE
BOARD OF IMMIGRATION APPEALS

ORDER

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 1003.1(e)(4).

/s/_____
FOR THE BOARD

APPENDIX D

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
7850 METRO PARKWAY, SUITE 320
BLOOMINGTON, MN 55425

File #: A95 205 192

[Filed June 23, 2003]

In the Matter of:	)
	)
Sergio Loeza Dominguez	)
Respondent	)
	)

IN REMOVAL PROCEEDINGS

Charge: § 212(a)(6)(A)(I)

Applications: Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents under § 240A(b); Voluntary Departure under § 240B(b) of the Act

WRITTEN DECISION OF THE IMMIGRATION JUDGE

Introduction and Procedural Summary

The respondent is a 35-year old male, native and citizen of Mexico who claims to have entered the United States on or about September 1, 1991, at or near Douglas, Arizona, without being admitted or paroled after inspection by an immigration officer. The Department of Homeland Security ("DHS"), formerly known as the Immigration and Naturalization Service ("the Service" or "INS"), has commenced removal proceedings against the respondent, charging him with being removable pursuant to the above-captioned section(s) of the Immigration and Nationality Act (hereinafter "INA" or "the Act").

The respondent has admitted all the factual allegations contained in the Notice to Appear (Exhibit 1) and conceded that he is removable as charged. Based on the respondent's admissions, the Court finds that removability has been established by clear, convincing, and unequivocal evidence. The respondent has designated Mexico as the country of removal should such action become necessary.

The respondent has submitted an application for Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents under § 240A(b) of the Act. (Exhibit 4) In the alternative, the respondent has applied for the privilege of voluntarily departing the United States in lieu of an order of removal pursuant to § 240B(b).

Applications for Relief- Applicable Law

The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien: (1) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application; (2) has been a person of good moral character during such period; (3) has not been convicted of an offense under § 212(a)(2), 237(a)(2), or 237(a)(3); and (4) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence. § 240A(b) of the Act. An alien must also demonstrate that he merits a favorable exercise of discretion. The Board has addressed what constitutes exceptional and extremely unusual hardship, among other issues, in Matter of Monreal-Aguinaga, 23 I&N Dec. 56 (BIA 2001), Matter of Andazola-Rivas, 23 I&N Dec. 319 (BIA 2002), and Matter of Recinas, 23 I&N Dec. 467 (BIA 2002).

In order to be eligible for voluntary departure at the conclusion of removal proceedings under § 240B(b) of the Act, an alien must show that: (1) the alien has been physically present in the United States for a period of at least one year immediately preceding the date the notice to appear was served under § 239(a); (2) the alien is, and has been, a person of good moral character for at least 5 years immediately preceding the alien's application for voluntary departure; (3) the alien is not deportable under § 237(a)(2)(A)(iii) (aggravated felon) or § 237(a)(4) (security and related grounds); and (4) the alien has established by clear and convincing evidence that the alien has the means to depart the

United States and intends to do so. § 240B(b) of the Act; 8 C.F.R. § 1240.26(c)(1).

Legal Analysis

The DHS claims that the respondent is statutorily ineligible for cancellation of removal because he has been convicted of an offense under § 237(a)(2) of the Act, namely § 237(a)(2)(E)(I) of the Act pertaining to child abuse. The respondent was convicted on or about May 6, 2002, in the Hennepin County District Court in Minneapolis, MN, of the offense of Malicious Punishment of a Child in violation of Minn. Stat. 609.377, Subd. 1. (Ex. 3). The offense was committed on or about January 27, 2002.

The respondent is not removable under § 237(a)(2)(E)(I) of the Act because there is no comparable ground of inadmissibility contained in § 212 of the Act. However, if a person has been convicted of an offense under § 237(a)(2) of the Act, the person is statutorily ineligible for cancellation of removal under § 240A(b) of the Act, despite the fact that the alien may not be removable based on that same offense.

The respondent argues that the offense of malicious punishment of a child does not constitute a crime of violence, and, therefore is not a crime of child abuse, child neglect, or child abandonment. (Ex 4). The Court finds that the respondent's argument is misplaced. Section 237(a)(2)(E)(I) states that, "For purposes of this clause, the term 'crime of domestic violence' means any crime of violence (as defined in section 16 of title 18, United States Code) against a person committed by..." The Act specifies that the "crime of domestic violence" must be a "crime of violence," but does not state the same for crimes of child abuse. The Court finds that the respondent's conviction for malicious punishment of

a child does constitute child abuse. Minnesota Statute 609.377, *Subd. 1 states:*

> Malicious punishment. A parent, legal guardian, or caretaker who, by an intentional act or a series of intentional acts with respect to a child, evidences unreasonable force or cruel discipline that is excessive under the circumstances is guilty of malicious punishment of a child and may be sentenced as provided in subdivisions 2 to 6.

(Ex. 4, pg. 9). The respondent was convicted of a gross misdemeanor. (Ex. 2, pg. 3; Ex. 3, pg. 13-15) **The respondent has been convicted of an offense under § 237(a)(2)(E)(I) of the Act pertaining to child abuse. Therefore, he is statutorily ineligible for cancellation of removal under § 240A(b) of the Act.**

Furthermore, the Court believes that the respondent's conviction for malicious punishment of a child constitutes a crime involving moral turpitude ("CIMT") under § 212(a)(2) of the Act. The Minnesota Statute for Malicious Punishment of a Child, supra, talks about how there must be an "intentional act or a series of intentional acts" evidencing "unreasonable force or cruel discipline that is excessive under the circumstances..." (Emphasis added) Just as a conviction for domestic assault is a CIMT, this Court finds the crime of Malicious Punishment of a Child to also be a CIMT. See Matter of Tran, 21 I&N Dec. 291 (BIA 1996). Also, at least one circuit court has determined that child abuse is a CIMT. See Guerrero de Nodahl v. INS, 407 F.2d 1405 (9th Cir. 1969). **Consequently, since the respondent has been convicted of a CIMT, he is statutorily barred from cancellation of removal on this basis also.**

With respect to the respondent's application for voluntary departure at the conclusion of removal proceedings, the Court finds that the respondent has failed to show that he is a person of good moral character because he has been convicted of a CIMT. See INA § 101 (f). Also, the Court would deny the respondent's application exercising negative discretion due to his conviction for malicious punishment of a child. Accordingly, the Court enters the following Orders:

Orders

IT IS HEREBY ORDERED that the respondent's application for cancellation of removal and adjustment of status under § 240A(b) of the Act be **DENIED**.

IT IS FURTHER ORDERED that the respondent's application for voluntary departure under § 240B(b) of the Act be **DENIED**.

IT IS FURTHER ORDERED that the respondent be removed from the United States to Mexico on the charge contained in the Notice to Appear.

Date: June 23, 2003 /s/_____

Kristin W. Olmanson
Immigration Judge

APPENDIX E

Excerpt of Brief for Respondent, dated January 31, 2005, filed with Eighth Circuit Court in *Loeza-Dominguez v. Gonzales*. Brief filed by Lyle Jentzer, Trial Attorney, U.S. Department of Justice, Office of Immigration Litigation

1. Loeza Dominguez's Conviction For Malicious Punishment Of A Child Constitutes A Conviction For Child Abuse Under INA Section 237(a)(2)(E)(I)

INA section 237(a)(2)(E)(I), 8 U.S.C. § 1227(a)(2)(E)(I), provides that "[a]ny alien who at any time after entry is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment, is deportable." INA § 237(a)(2)(E)(I), 8 U.S.C. § 1227(a)(2)(E)(I). The term "child abuse" is not defined in the statute. As the BIA has noted:

> in including child abuse as a ground of removal in section 237(a)(2)(E)(I) of the Act, Congress likewise did not refer to a particular statutory definition, although in the same section it did designate a statutory definition for the term 'crime of domestic violence.' By its common usage, 'child abuse' encompasses actions or inactions that also do not require physical contact. See Blacks Law Dictionary [(6th ed. 1990)] supra, at 239 (defining child abuse as '(a)ny form of cruelty to a child's physical, moral or mental well-being').

In Re Rodriguez Rodriguez, 22 I. & N. Dec. 991, 996 (BIA 1999) (emphasis added). Ignoring this language, and without citing any case law from this or any other court in support of his position, Loeza Dominguez argues that under the INA there is a requirement of physical injury for child abuse, and that because Minn. Stat. § 609.377 does not contain an element of physical injury, he cannot be found to have been convicted of child abuse. Petitioner's Brief at 4, 5, 8. Loeza Dominguez's underlying premise – that physical force is a necessary element of child abuse – is untenable and should be rejected.

In support of his argument, Loeza Dominguez cites the definition of child abuse in 42 U.S.C. § 13031(c)(1) (Federal Child Abuse Reporting Requirements) as a useful identification of the forms of child abuse. Petitioner's Brief at 8. This statute defines child abuse as "the physical or mental injury, sexual abuse or exploitation, or negligent treatment of a child."[5] Loeza Dominguez argues that "in the context of this case," the only relevant portion of this definition pertains to physical injuries. Id.

As the immigration judge noted, however, this argument is misplaced. A.R. 36. While INA section 237(a)(2)(E)(I) specifies that "the term 'crime of domestic violence,' means any crime of violence," it does not include a similar provision pertaining to the offense of child abuse. Moreover, the definition of child abuse contained in 42 U.S.C. § 13031(c)(1) – which the BIA has found useful in identifying the forms of

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[5] The identical definition of child abuse also appears at 18 U.S.C. § 3509, "Child Victims and Child Witnesses' Rights," which provides at subsection (a)(3) that "the term 'child abuse' means the physical or mental injury, sexual abuse or exploitation, or negligent treatment of a child."

child abuse, see Rodriguez-Rodriguez, 22 I. & N. Dec. at 995 – also defines child abuse in terms of "mental injury" of a child, which is further defined as "harm to a child's psychological or intellectual functioning" 42 U.S.C. § 13031(c)(3); accord 18 U.S.C. § 3509(a)(5). Loeza Dominguez provides no reason why this portion of the definition of child abuse is inapplicable to the case herein.

The statute under which Loeza Dominguez was convicted provides that "[a] parent, legal guardian, or caretaker who, by an intentional act or a series of intentional acts with respect to a child, evidences unreasonable force or cruel discipline that is excessive under the circumstances is guilty of malicious punishment of a child." Minn. Stat. § 609.377, subd. 1 (emphasis added). "Evidences unreasonable force or cruel discipline that is excessive," clearly implicates causing the victimized child some form of severe injury, whether it be physical or psychological. Cf. Blacks Law Dictionary at 239 (6th ed. 1990) (defining child abuse as '(a)ny form of cruelty to a child's physical, moral or mental well-being'). The immigration judge's determination that Loeza Dominguez was convicted of child abuse under INA section 237(a)(2)(E)(I) is therefore a manifestly reasonable interpretation of the statute to which the Court must afford due deference. Aguirre-Aguirre, 526 U.S. at 424; Chevron USA, 467 U.S. at 842-44 (1984); Regalado-Garcia, 305 F.3d at 787; Franklin, 72 F.3d at 572; Arkansas AFL-CIO, 11 F.3d at 1441. The Court should, accordingly, affirm the immigration judge's holding and deny Loeza Dominguez's petition for review

* * * * *

APPENDIX F

Excerpt from Board of Immigration Appeals precedent decision, *Rodriguez-Rodriguez*, 22 I&N Dec. 991, 994-96 (BIA 1999)

In defining the term "sexual abuse of a minor," we are not obliged to adopt a federal or state statutory provision. The Attorney General is charged with the administration and enforcement of the Act, and she has delegated to this Board the interpretation of the definition of an aggravated felony as it arises in proceedings such as these. Section 103(a)(1) of the Act, 8 U.S.C. § 1103(a)(1) (Supp. II 1996); 8 C.F.R. § 3.1 (1999). In amending the aggravated felony definition to include sexual abuse of a minor, Congress did not use the phrase "an offense described in section" and then designate a definition found in the federal statute, as it did elsewhere in section 101 (a)(43) of the Act,[1] or name an offense and then, in parentheses, state "as described in" or "as defined in" a federal statute.[2] Where Congress includes particular language in one section but omits it from another, it is presumed that Congress acted intentionally and purposefully. *INS v. Cardoza-Fonseca, supra,* at 432.

We recognize, however, that removal proceedings are a function of federal law. *See Wilson v. INS*, 43 F.3d 211 (5th Cir.), *cert. denied*, 516 U.S. 811 (1995), and cases cited

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[1] *See* sections 101(a)(43)(D), (E), (H), (I), (J), (K)(ii), (iii), (L), (N), (O), (P) of the Act.

[2] *See* sections 101(a)(43)(B), (C), (F) of the Act.

therein. In determining whether a specific offense falls within a classification described in deportation or removal provisions in the Act, we have looked to a federal definition. *See Matter of L-G-*, 21 I&N Dec. 89 (BIA 1995) (using a federal definition to determine whether a crime is a felony within the meaning of 18 U.S.C. § 924(c)(2)(1994), and is therefore an aggravated felony under section 101(a)(43)(B) of the Act); *Matter of Manrique,* 21 I&N Dec. 58 (BIA 1995) (requiring comparison of the terms of individual state laws with those in 18 U.S.C. § 3607(a) (1988) in determining whether a conviction has been expunged), *superseded by Matter of Roldan,* 22 I&N Dec. 512 (BIA 1999); *Matter of Barrett,* 20 I&N Dec. 171 (BIA 1990); *see also Taylor v. United States,* 495 U.S. 575 (1990) (holding that a state conviction for burglary constitutes such an offense under 18 U.S.C. § 924(e) when the offense's statutory definition substantially corresponds to the generic federal definition).

The term "sexual abuse of a child" is defined in 18 U.S.C. §§ 2242, 2243, 2246, and 3509(a) (1994). Under 18 U.S.C. §§ 2242 and 2243, the crimes of "sexual abuse" and "sexual abuse of a minor or ward" require a sexual act, a component of which, according to 18 U.S.C. § 2246, is contact. The Texas statute under which the respondent was convicted does not involve contact and thus does not fall within this definition. The rights of child victims and child witnesses in the context of federal proceedings are delineated in 18 U.S.C. § 3509(a). That statute defines "sexual abuse" as "the employment, use, persuasion, inducement, enticement, or coercion of a child to engage in, or assist another person to engage in, sexually explicit conduct or the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children." 18 U.S.C. § 3509(a)(8). Sexually explicit conduct includes lascivious exhibition of the genitals or pubic area of a person or animal.

18 U.S.C. § 3509(a)(9)(D). The Texas statute can be fairly construed to fall within this definition.

We find the definition of sexual abuse in 18 U.S.C § 3509(a)(8) to be a useful identification of the forms of sexual abuse. This statute encompasses those crimes that can reasonably be considered sexual abuse of a minor. The term "sexual abuse" is commonly defined as "[i]llegal sex acts performed against a minor by a parent, guardian, relative, or acquaintance." *Blacks Law Dictionary* 1375 (6th ed. 1990) Abuse is defined in relevant part as physical or mental maltreatment. This definition suggests that the common usage of the term includes a broad range of maltreatment of a sexual nature, and it does not indicate that contact is a limiting factor.

We note that in including child abuse as a ground of removal in section 237(a)(2)(E)(I) of the Act, Congress likewise did not refer to a particular statutory definition, although in the same section it did designate a statutory definition for the term "crime of domestic violence." By its common usage, "child abuse" encompasses actions or inactions that also do not require physical contact. *See Blacks Law Dictionary, supra,* at 239 (defining child abuse as "[a]ny form of cruelty to a child's physical, moral or mental well-being"). We recognize also that states categorize and define sex crimes against children in many different ways and find that 18 U.S.C. § 3509(a) better captures this broad spectrum of sexually abusive behavior. The definition set forth in 18 U.S.C. §§ 2242, 2243, and 2246 is, in our view, too restrictive to encompass the numerous state crimes that can be viewed as sexual abuse and the diverse types of conduct that would fit within the term as it commonly is used.

That definition is also not consistent with Congress' intent to remove aliens who are sexually abusive toward children and to bar them from any relief. Congress did not direct that crimes of sexual abuse be limited to crimes requiring contact as an element, and we do not interpret the term in that manner. Because Congress intended to provide in the Act a comprehensive scheme to cover crimes against children, we view the definition found at 18 U.S.C. § 3509(a) to be a more complete interpretation of the term "sexual abuse of a minor" as it commonly is used, and therefore to be a reasonable interpretation of that term, We are not adopting this statute as a definitive standard or definition but invoke it as a guide in identifying the types of crimes we would consider to be sexual abuse of a minor.

APPENDIX G

ADMINISTRATIVE RECORD EXCERPTS

Pages 106-107 of the administrative record in *Loeza-Dominguez v. Gonzales*. Letter from Speech Pathologist documenting that Petitioner, Sergio Loeza-Dominguez, is father to a U.S. citizen daughter who suffers severe delays in her ability to understand and process language.

HCMC
Level 1 Trauma Center

Speech-Language Pathology Department

March 8, 2003

Sonja Griebel, MA, CCC-SLP
Speech-Language Pathologist
Hennepin County Medical Center
701 Park Avenue
Minneapolis, MN 55415

The Honorable Kristin W. Olmanson
Immigration Court
7850 Metro Parkway
Suite 320
Bloomington, MN 55425

Re: Mr. Sergio Loeza-Dominguez and his daughter Monserrat Loeza-Rodriguez, DOB: 02/19/1998

Dear Examinations Officer:

My name is Sonja Griebel, and I am writing this letter on behalf of Mr. Sergio Loeza-Dominguez and his daughter, Monserrat Loeza-Rodriguez. I have worked as a bilingual Speech-Language Pathologist for 5 years at Hennepin County Medical Center (HCMC) in Minneapolis, MN since June, 1998. My caseload at HCMC is primarily Spanish speaking children and bilingual children with speech and or language delays.

I have had the pleasure of working with Monserrat and her family since October of 2000. An evaluation at that time showed a severe delay in her ability to understand and process language and a moderate delay in her ability to use words and sentences to express herself and communicate with others. At that time she had not had any exposure to English and this delay was in her native Spanish language. Because of her young age at that time (33 months) I was not concerned about her ability to use sounds correctly in words (articulation). Treatment began and focused on areas such as increasing her vocabulary, increasing the number of words she used in sentences, asking and answering questions, and understanding directions and concepts. Treatment continued until August 2001 when I went on a three-month maternity leave. At that time she had improved to demonstrating an overall moderate delay in understanding and using language correctly in words. She specifically had difficulty saying all the syllables in words with more than 2 syllables and with saying all the syllables in the correct sequence. This affected how well other people understood her and caused her frustration.

Upon return from my maternity leave in November 2001, treatment resumed. At this time she had started preschool and was beginning to learn English. Spanish was the primary

language used in treatment, but using English was no discouraged. It also became apparent that while her vocabulary was increasing she had difficulty learning and retaining new words. She appeared to have word finding problems, and our treatment goals focused on this as well as articulation. Her family was very involved, and continues to be involved in Monserrat's therapy. They are always able to follow through with activities to do at home to help Monserrat.

I recently re-evaluated Monserrat (please see enclosure for specific test results) and she has made nice gains. Her ability to understand and process language and use language to communicate with others is within normal limits in comparison to other bilingual children her age, but she continues to have a mild-moderate delay in vocabulary/word finding and her ability to learn and retain new words. This is evident when she is talking as she often pauses to have someone "fill in the word" for her or is often asking what things are called. She continues to have difficulty remembering and retaining even simple vocabulary such as "shirt" and "pants". This is not developmentally appropriate for a bilingual child her age. She is often labeling pictures and objects in English more than Spanish (but still using both) and clearly benefits from working with a bilingual speech-language pathologist who can appreciate and encourage development in both languages. At the single word level her ability to use sounds correctly in words in both Spanish and English is also within normal limits, but it has not carried over to conversational speech. She continues to have difficulty using all the syllables in words greater than three syllables and with saying the correct sequence of syllables within the words. This is not developmentally appropriate for a bilingual child her age. It continues to affect her ability to produce speech that is understandable by others in a variety

of contexts. Our treatment will continue to address her ability to learn and retain new vocabulary and her ability to produce developmentally appropriate understandable speech. Her prognosis for developmentally appropriate speech, language and vocabulary is excellent with continued therapy with a bilingual speech-language pathologist and continued involvement in a language rich preschool with eventual transition to a kindergarten that provides English Language Learner (ELL) services.

Monserrat's speech and language development has progressed because of her ability to be in a language rich preschool environment and her ability to receive therapy with a bilingual speech-language pathologist. Her parents' involvement and ability to follow-through at home have also enhanced it. If she were to move to Mexico, she would not have the opportunity to continue this type of therapy approach or be involved in a preschool/kindergarten that has background and training in working with English Language Learners. Because Monserrat is learning to be bilingual, her academic success could be affected if she is not able to receive proper instruction, such as is offered in the United States with teachers and staff who have had training in working with English Language Learners. Furthermore, even though Monserrat's language, articulation, and vocabulary are continuing to develop, she is at risk for learning difficulties given her history of delayed language development and difficulties with word finding. After discharge from speech and language therapy, Monserrat will require careful monitoring and periodic re-evaluation (every 6-12 months) to ensure that her speech and language skills continue to develop as she becomes involved in more academically difficult activities. Ideally, a bilingual speech-language pathologist should conduct this. To my knowledge, this is not available in Mexico.

Because of her previously mentioned reasons, it is my reques that you kindly consider Mr. Loeza's application fo permanent residence so that he may remain in the Unitec States to care for Monserrat. If you have any question please do not hesitate to call me at 612-347-8550. Thank you.

Sincerely,

/s/_____

Sonja Griebel, MA, CCC-SLP
Speech-Language Pathologist

Page 139 of the administrative record in *Loeza-Dominguez v. Gonzales*. Vocational Center intake record documenting that Petitioner, Sergio Loeza-Dominguez, is an amputee and has only one arm.

VOCATIONAL SERVICES
STAFFING REPORT

NAME: Sergio Dominguez

COUNSELOR: Alan Gordon, NRS

EVALUATOR: Leanne Jackson

VOCATIONAL SPECIALIST: Steve Rosenberg

Wide Range Achievement Test - R

	Raw Score	Grade Equiv.	Toile
Arithmetic	25	Ending 6th	4

APTITUDE TESTING:

GATB/with SEM

G N/A S 74/82 K 62/69
V N/A P 61/70 F N/A
N N/A Q 80/89 N N/A
* Computational Section: 58

Peabody Picture Vocabulary Test

Raw Score - 85
Norms - Not Applicable

VOCATIONAL INTERESTS and GOALS (expressed and tested):

- Expressed: Business (Hombre de Negocios), Pilot
- Tested & WRIOT: Sales, Office Work, Protective Service, Number, Machine Operation

STRONGEST PERFORMANCE AREA WHICH WAS IDENTIFIED: Clerical, Bench Work

VOCATIONAL ASSETS

- Personable and friendly
- Good work habits
- Quick learner
- Willing to try new things
- Functional command of English
- Able to make change correctly
- Able to perform an assembly task modified with clamps
- Performance on an electronic assembly task - soldering
- Accuracy on a calculator task
- Average Eye-Hand-Foot coordination
- Work experience
- Physical stamina
- Motivated to work
- Interest in training to improve English
- Future vocational goal in business

VOCATIONAL CONSIDERATIONS

- Right above-elbow amputation
  - limited grasping, carrying, lifting, manipulating

- English skills
- Has a prosthesis in Mexico
- Lack of recent work experience
- Dependent on public transportation

Pages 157- 159 of the administrative record in *Loeza-Dominguez v. Gonzales*. Excerpt of transcript from Sergio Loeza-Dominguez's plea of guilty to "malicious punishment of a child" under Minnesota Statute 609.377

physically punish a child in such a manner so that they have those whelps that are still visible. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: And that's why you're entering your plea of guilty?

THE DEFENDANT: Yep.

THE COURT: Did anyone force you to plead guilty?

THE DEFENDANT: No.

THE COURT: All right. The Petition to Enter a Plea of Guilty then will remain a part of the court file. Could you inquire about the facts, Mr. Sutcliffe?

BY MR. SUTCLIFFE:

Q. Mr. Dominguez, on January 18th, 2002 -- what city do you live in?

A. Minneapolis.

Q. What's your address?

A. 4249 14th Avenue.

Q. 14th Avenue South. At that place, 4249 14th Avenue

South in the City of Minneapolis, Hennepin County, Minnesota, did you have a confrontation with your stepson on that date?

A. Well, yeah. I tried to -- he explain to me what happened the day before.

Q. You got a call from the school indicating that he had done some things in school that had been continuous in nature; is that correct?

A. Um-hum.

Q. Yes?

THE COURT: Use words.

THE DEFENDANT: Yes.

BY MR. SUTCLIFFE:

Q. And at that time you became angry and disciplined him; is that correct?

A. Yep.

Q. All right. What did you use to discipline him?

A. Well, iron cord.

Q. The cord?

A. Yeah.

Q. It was a cord from an iron?

A. Yeah.

Q. And you hit him on the back?

A. Well -- yeah, just one.

Q. Okay.

A. And it went on his leg.

Q. And on the leg also?

A. (Witness nodded head.)

Q. Do you agree that that was excessive? Under the circumstances, that that was too much to do? You realize now that that was not the correct thing to do?

A. Well, it wasn't the correct thing to do, yeah.

Q. And you understand that that kind of punishment is against the law in the State of Minnesota?

A. Yes.

A. Okay.

MR. SUTCLIFFE: I have nothing further, your Honor.

THE COURT: Mr. Sergio Dominguez, I accept your plea of guilty to the charge of gross misdemeanor malicious punishment of a child.

Page 178 of the administrative record in *Loeza-Dominguez v. Gonzales*. Warrant of Commitment.

WARRANT OF COMMITMENT

Case Name: Sergio Loeza Dominguez
DOB: 07/15/67
SIP Person No. 00933046

X Out of Custody
X Work Release

To: The Sheriff of Hennepin County and to the Commissioner of Corrections/Superintendent of the Adult Corrections Facility hennepin County, of the State of Minnesota.

The defendant named above was found guilty by this Court of the offense listed. Commencing on date indicated, this defendant must serve the term/days shown and be confined at WH, Minnesota and/or the Adult Corrections Facility of the County of Hennepin.

In the name of the State of Minnesota, you, the Superintendent or Commissioner, are commanded to receive this defendant into your custody. You are to safely keep him/her for the term indicated unless he/she shall be discharged sooner by due process of law or unless he/she shall pay the stated fine if a fine is shown.

SIP Case No. 02005352
Court Div. 1
Charging Community: HC

Gross Misdemeanor
Count 1
Offense: Malicious Punishment of a Child
Stat/Ord No. 5609.37751

Days: 60 Credit: 7

Remarks: Huber work release – Complete 20 days @ WH, then release to EHM with Huber work Release

Reporting Date: 05/28/02
Time: 18:00

Sentencing Judge: T. Bransford

Date: 05/07/02 /s/_____
County Deputy

Tele# 612-348-2612

APPENDIX H

RELEVANT STATUTORY PROVISION

Minnesota Statute 609.377
Malicious punishment of a child.

Subdivision 1. **Malicious punishment.** A parent, legal guardian, or caretaker who, by an intentional act or a series of intentional acts with respect to a child, evidences unreasonable force or cruel discipline that is excessive under the circumstances is guilty of malicious punishment of a child and may be sentenced as provided in subdivisions 2 to 6.

Subd. 2. **Gross misdemeanor.** If the punishment results in less than substantial bodily harm, the person may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than $3,000, or both.

Subd. 3. **Enhancement to a felony.** Whoever violates the provisions of subdivision 2 during the time period between a previous conviction or adjudication for delinquency under this section or sections 609.221 to 609.2231, 609.224, 609.2242, 609.342 to 609.345, or 609.713, and the end of five years following discharge from sentence or disposition for that conviction or adjudication may be sentenced to imprisonment for not more than five years or a fine of $10,000, or both.

Subd. 4. **Felony; child under age four.** If the punishment is to a child under the age of four and causes bodily harm to the head, eyes, neck, or otherwise causes

multiple bruises to the body, the person may be sentenced to imprisonment for not more than five years or a fine of $10,000, or both.

Subd. 5. **Felony; substantial bodily harm.** If the punishment results in substantial bodily harm, the person may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than $10,000, or both.

Subd. 6. **Felony; great bodily harm.** If the punishment results in great bodily harm, the person may be sentenced to imprisonment for not more than ten years or to payment of a fine of not more than $20,000, or both.

Minnesota Statute § 609.02, Definitions, Subds. 7 - 8

Subd. 7. **Bodily harm.** "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.

Subd. 7a. **Substantial bodily harm.** "Substantial bodily harm" means bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily member or organ, or which causes a fracture of any bodily member.

Subd. 8. **Great bodily harm.** "Great bodily harm" means bodily injury which creates a high probability of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily harm.

FILED
AUG 14 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-1432

In the Supreme Court of the United States

SERGIO LOEZA-DOMINGUEZ, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, on petition for review of an order of removal in which the Board of Immigration Appeals (Board) summarily affirmed the decision of the immigration judge (IJ) and then designated the IJ's opinion as the final agency determination, the court of appeals should review the Board's procedural decision not to refer the appeal to a three-member panel for a written opinion or should instead proceed to review the agency's final determination on the merits.

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In the Supreme Court of the United States

No. 05-1432

SERGIO LOEZA-DOMINGUEZ, PETITIONER

v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-7a) is reported at 428 F.3d 1156. The order of the Board of Immigration Appeals (Pet. App. 8a) and the decision of the immigration judge (Pet. App. 9a-14a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 17, 2005. A petition for rehearing was denied on February 7, 2006 (Pet. App. 1a). The petition for a writ of certiorari was filed on May 8, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. An alien who has been ordered removed from the United States by an immigration judge (IJ) may appeal the order to the Board of Immigration Appeals (Board). See

8 U.S.C. 1229a(c)(4); 8 C.F.R. 1003.1(b)(1)-(3), 1240.53(a). Prior to 1999, administrative appeals from the removal orders of IJs were heard by three-member panels of the Board. On October 18, 1999, the Attorney General adopted new regulations, which were further amended on August 26, 2002, to streamline the appellate process. See 64 Fed. Reg. 56,135 (1999); 67 Fed. Reg. 54,878 (2002).

Pursuant to those rules, an appeal is assigned for initial review to a single member of the Board. 8 C.F.R. 1003.1(e). If that member finds that the result reached in the IJ's decision was correct and that any errors "were harmless or nonmaterial," and further finds that either (A) the case is "squarely controlled by existing Board or federal court precedent and do[es] not involve the application of precedent to a novel factual situation," or (B) "[t]he factual and legal issues raised on appeal are not so substantial that the case warrants the issuance of a written opinion," the reviewing judge affirms the decision without issuing a separate opinion. 8 C.F.R. 1003.1(e)(4)(i)(A) and (B).[1] In such cases, the Board issues the following order: "The Board affirms, without opinion, the result of the decision below. The decision below is, therefore, the final agency determination. *See* 8 CFR 3.1(e)(4)." 8 C.F.R. 1003.1(e)(4)(ii). Because an affirmance without opinion (AWO) renders the decision of the IJ "the final agency determination," the regulation specifies that "[a]n order affirming without opinion * * * shall not include further explanation or reasoning." *Ibid.*

---

[1] The regulation states that an affirmance without opinion "approves the result reached in the decision below," and that while "it does not necessarily imply approval of all of the reasoning of that decision, [it] * * * does signify the Board's conclusion that any errors in the decision of the immigration judge or the Service were harmless or nonmaterial." 8 C.F.R. 1003.1(e)(4)(ii).

If the alien files a petition for review in the court of appeals, the Attorney General has made clear that it is the decision of the IJ, and not the Board's summary affirmance, that is the proper subject of judicial review. See 64 Fed. Reg. at 56,137 ("The decision rendered below will be the final agency decision for judicial review purposes."); *id.* at 56,138 ("For purposes of judicial review * * * the Immigration Judge's decision becomes the decision reviewed.").

b. The impetus for the streamlining reform was the explosive increase in the caseload of the Board. See 64 Fed. Reg. at 56,136. Between 1984 and 1998, the number of new appeals and motions before the Board increased from 3000 annually to 28,000 annually. *Ibid.* Faced with such a staggering increase, the Board's ability to accomplish its mission—"to provide fair and timely immigration adjudications and authoritative guidance and uniformity in the interpretation of the immigration laws"—had been compromised. *Ibid.* To ameliorate that problem, the Attorney General implemented the system of streamlined appellate review. The system is premised on the recognition that "in a significant number of appeals and motions filed with the Board, a single appellate adjudicator can reliably determine that the result reached by the adjudicator below is correct and should not be changed on appeal." *Id.* at 56,135. In such cases, "the rule authorizes a single permanent Board Member to review the record and affirm the result reached below without issuing an opinion." *Id.* at 56,135-56,136. The result is a system that enables the Board to render decisions in a more timely manner, while husbanding its limited resources. See *Blanco de Belbruno* v. *Ashcroft*, 362 F.3d 272, 280 (4th Cir. 2004) ("[T]he agency adopted regulations that would allow it to focus a greater measure of its resources on more complicated cases.").

2. Petitioner, a citizen of Mexico, entered the United States without inspection in September 1991. In May 2002, petitioner pleaded guilty to the crime of malicious punishment of a child in violation of Minnesota law. See Minn. Stat. Ann. § 609.377 subdiv. 1 (West 2003) ("A parent * * * who, by an intentional act or a series of intentional acts with respect to a child, evidences unreasonable force or cruel discipline that is excessive under the circumstances is guilty of malicious punishment of a child."). The complaint alleged that petitioner repeatedly struck his stepson on the back and legs with an electrical cord, causing "two long, red, circular marks" on his stepson's back and a large bruise on his stepson's thigh. Pet. App. 3a, 6a.

In June 2002, the government charged petitioner with being subject to removal for having entered the United States without inspection. Petitioner conceded that he was removable, but applied for, *inter alia*, cancellation of removal. Pet. App. 3a.

3. a. The IJ ordered that petitioner be removed, determining that petitioner was ineligible for cancellation of removal. Pet. App. 9a-14a. The IJ concluded that, for two independent reasons, petitioner's conviction for malicious punishment of a child rendered him ineligible for cancellation of removal, see 8 U.S.C. 1229b(b)(1)(C): (i) petitioner was convicted of a crime of child abuse, see 8 U.S.C. 1227(a)(2)(E)(i); and (ii) petitioner was convicted of a crime involving moral turpitude, 8 U.S.C. 1227(a)(2)(A)(i). Pet. App. 12a-13a.

b. The Board affirmed the IJ's decision without opinion, pursuant to 8 C.F.R. 1003.1(e)(4). Pet. App. 8a. The Board's AWO order, as prescribed by regulation, stated that the IJ's decision "is * * * the final agency determination." *Ibid.*; see 8 C.F.R. 1003.1(e)(4)(ii).

4. Petitioner filed a petition for review, which the court of appeals denied. Pet. App. 2a-7a. The court upheld the IJ's determination that petitioner was ineligible for cancellation of removal because he had been convicted of a crime of child abuse. The court explained that the term "child abuse" in 8 U.S.C. 1227(a)(2)(E)(i) is not defined by the statute, and that a reasonable interpretation of the term by the Board thus would be accorded deference. Pet. App. 4a. The court observed that the Board had given "child abuse" a "relatively broad construction" by "citing the *Black's Law Dictionary* definition of 'child abuse' as 'any form of cruelty to a child's physical, moral, or mental well-being.'" *Id.* at 5a (quoting *In re Rodriguez-Rodriguez*, 22 I. & N. Dec. 991, 996 (1999)). The court concluded that the Board's construction is reasonable. The court further explained that, although the IJ in this case had not explicitly defined the term "child abuse," the IJ was required by regulation to apply Board precedent defining that term. *Ibid.* (citing 8 C.F.R. 1003.1(g)).

The court rejected petitioner's argument that his conviction for malicious punishment of a child under Minnesota law could have been based on conduct that failed to qualify as "child abuse" under the Board's understanding of the term, *i.e.*, "cruelty to a child's physical, moral, or mental well-being." The court explained that the criminal complaint against petitioner "alleged that he repeatedly struck his stepson on the back and legs with the electrical cord from an iron," and that petitioner had "admitted as much during his plea hearing." Pet. App. 6a. The court also observed that the complaint alleged that petitioner's stepson had "suffered physical injuries, including two long, red, circular marks, and a large bruise on his thigh." *Ibid.* (internal quotation marks omitted). The court concluded that a "reasonable adjudicator easily could conclude that

this conduct was a form of cruelty to the child's physical, moral or mental well-being, and thus constituted child abuse as defined by the BIA." *Id.* at 6a-7a. Because the court held that petitioner had been convicted of a crime of child abuse, the court declined to reach the IJ's alternative holding that petitioner's crime was also one involving moral turpitude. *Id.* at 7a.

Finally, the court rejected petitioner's contention that it should review the Board's determination to apply its AWO procedure to this case. The court relied on its prior decision in *Ngure* v. *Ashcroft*, 367 F.3d 975 (8th Cir. 2004), which held that the Board's determination to apply its AWO procedure is committed to agency discretion and thus is not subject to judicial review. Pet. App. 7a.

ARGUMENT

1. Petitioner contends (Pet. 26-29) that this Court should grant review to resolve a disagreement among the courts of appeals on whether the courts of appeals have jurisdiction to review a determination by the Board to apply its AWO procedure. There is no warrant for granting review of that question. The Court has previously denied review of the issue, *Aleru* v. *Gonzales*, 544 U.S. 919 (2005); *Kebede* v. *Gonzales*, 544 U.S. 947 (2005), and there is no reason for a different result in this case.

a. Petitioner does not contend that the AWO procedure is facially invalid under the Constitution or the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.* Indeed, every court of appeals to address the question has upheld the AWO procedures against facial statutory and constitutional challenges. See *Albathani* v. *INS*, 318 F.3d 365 (1st Cir. 2003); *Zhang* v. *United States Dep't of Justice*, 362 F.3d 155 (2d Cir. 2004); *Dia* v. *Ashcroft*, 353 F.3d 228 (3d Cir. 2003) (en banc); *Khattak* v. *Ashcroft*, 332 F.3d 250 (4th Cir. 2003); *Soadjede* v. *Ashcroft*, 324 F.3d 830 (5th Cir.

2003) (per curiam); *Denko* v. *INS*, 351 F.3d 717 (6th Cir. 2003); *Georgis* v. *Ashcroft*, 328 F.3d 962 (7th Cir. 2003); *Loulou* v. *Ashcroft*, 354 F.3d 706 (8th Cir. 2003), cert. denied, 543 U.S. 987 (2004); *Falcon Carriche* v. *Ashcroft*, 350 F.3d 845 (9th Cir. 2003); *Hang Kannha Yuk* v. *Ashcroft*, 355 F.3d 1222 (10th Cir. 2004); *Mendoza* v. *United States Attorney Gen.*, 327 F.3d 1283 (11th Cir. 2003).

Neither the Constitution nor the INA imposes a requirement that appeals be heard by multi-member panels. The INA provides only that an IJ shall inform an alien of "the right to appeal" the IJ's order of removal, 8 U.S.C. 1229a(c)(4), and that the IJ's "order of deportation" becomes final upon the earlier of "a determination by the Board of Immigration Appeals affirming such order" or the expiration of time in which to take an appeal, 8 U.S.C. 1101(a)(47). The government thus could, consistent with the INA, simply provide that all appeals from orders of removal are to be adjudicated by a single member of the Board, as is the case in many other administrative schemes. See *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 543 (1978) ("agencies should be free to fashion their own rules of procedure," so long as not proscribed by Congress) (internal quotation marks omitted). Cf., *e.g.*, 7 C.F.R. 1.132, 1.145 (providing that decisions of administrative law judges are appealed to a single "judicial officer" acting for the Secretary of Agriculture). There could be no constitutional doubt as to the propriety of such a regulation. See *Albathani*, 318 F.3d at 375 (observing that, even when the Board streamlines a case, the alien still has a right to a full and fair asylum hearing before the IJ, the opportunity to present her arguments to the Board, and a decision by a Board member); *Falcon Carriche*, 350 F.3d at 850 (noting that the argument that aliens are "entitled to an additional procedural safeguard—namely, review of

their appeal before three members of the BIA"—has "no support in the law").

Nor does anything in the INA or the Constitution require that the Board state its reasoning in a separate written opinion, rather than affirm on the basis of the IJ's own explanation of its holding. Indeed, even before the Attorney General adopted formal streamlining procedures, the Board (sitting in three-member panels) would frequently affirm on the basis of the IJ's opinion. The courts of appeals had uniformly upheld that practice, noting that, in such circumstances, the court was able to review the opinion of the IJ. See, *e.g.*, *Singh-Kaur* v. *INS*, 183 F.3d 1147, 1150 (9th Cir. 1999) ("When the BIA adopts an IJ's findings and reasoning, we review the IJ's opinion as if it were the opinion of the BIA."); *Dobrican* v. *INS*, 77 F.3d 164, 167 (7th Cir. 1996) ("[W]here the BIA adopts the reasoning of the IJ, we have held that the BIA adequately explains its decision when it adopts the IJ's decision, and we base our review solely on the IJ's analysis."); *Prado-Gonzalez* v. *INS*, 75 F.3d 631, 632 (11th Cir. 1996) ("[E]very court of appeals that has considered this issue (the Second, Fourth, Fifth, Seventh, Eighth, Ninth and Tenth Circuits) has held that the Board need not write a lengthy opinion that merely repeats the immigration judge's reasons for denying the requested relief, but instead may state that it affirms the immigration judge's decision for the reasons set forth in the decision.") (collecting cases). These observations are equally valid regarding the AWO procedure, pursuant to which, when the Board affirms without opinion, the IJ's decision *is* the final agency determination. See 8 C.F.R. 1003.1(e)(4)(ii).

b. As petitioner observes (Pet. 10-20), the courts of appeals have taken differing approaches in addressing whether the Board's decision to apply its AWO procedure

in a particular case is subject to judicial review. The extent of disagreement among the circuits, however, is essentially confined to narrow circumstances not implicated here, and does not, in any event, warrant review by this Court.

i. The court of appeals correctly concluded that the Board's use of its AWO procedure is not subject to judicial review. In the court's previous opinion in *Ngure* v. *Ashcroft*, 367 F.3d 975 (8th Cir. 2004), the court provided a number of reasons in support of its conclusion that the Board's determination to utilize the AWO procedures in a particular case is "committed to agency discretion and not subject to judicial review," *id.* at 983.

First, the court recognized that, in light of separation of powers principles and deference to Executive expertise—which is especially appropriate in the immigration context—"agencies should be free to fashion their own rules of procedure" for discharging their many duties. *Ngure*, 367 F.3d at 983 (quoting *Vermont Yankee Nuclear Power Corp.*, 435 U.S. at 543).

Second, the court determined from "the text, structure, and history of the streamlining regulations" that the Attorney General "surely did not intend to create substantive rights for aliens," *Ngure*, 367 F.3d at 983, or "to confer important procedural benefits upon individuals," *id.* at 984 (quoting *American Farm Lines* v. *Black Ball Freight Serv.*, 397 U.S. 532, 538 (1970)), by promulgating the AWO regulation. To the contrary, "judicial review of the BIA's streamlining decision would have 'disruptive practical consequences' for the Attorney General's administration of the alien removal process." *Ibid.* (quoting *Southern Ry.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444, 457 (1979)); see *id.* at 985 ("It has never been thought that the Supreme Court would review the propriety of this court's decision to affirm a district court without opinion

* * * , as opposed to the merits of the underlying decision, and we see no reason to believe that the Department of Justice intended its comparable rule to have a different effect.").

Third, the court of appeals reasoned that the Board's decision to apply the AWO procedure to a particular case was not susceptible to a "meaningful and adequate standard of review." *Ngure*, 367 F.3d at 985. The court compared the issue to that addressed in *ICC* v. *Brotherhood of Locomotive Eng'rs*, 482 U.S. 270 (1987), in which this Court held that it would not separately review the ICC's decision declining to reopen a prior action on grounds of material error, because such review would merge with the Court's review of the underlying merits. *Id.* at 279.

Fourth, the court observed that the decision whether a particular case presented a sufficiently "substantial" issue to "warrant[] the issuance of a written opinion" required the exercise of the Board member's own knowledge about the Board's limited resources and expertise as to whether a published decision in a particular case, as compared with others that might present the same issue, would advance the overall administration of the Attorney General's adjudication program and the development of immigration law. *Ngure*, 367 F.3d at 986.

Additional considerations confirm that the Attorney General did not intend to create private rights by adopting the AWO procedures. Rather, their purpose was to facilitate the efficient *internal* functioning of the agency. See 64 Fed. Reg. at 56,138 ("The streamlining system will allow the Board to manage its caseload in a more timely manner while permitting it to continue providing nationwide guidance through published precedents in complex cases involving significant legal issues."); 67 Fed. Reg. at 54,888 (comparing the determination whether to issue a

written opinion to a court of appeals' decision whether to publish an opinion). Indeed, the internal administrative character of the regulation is confirmed by the subsection's heading—"[c]ase management system." 8 C.F.R. 1003.1(e). Furthermore, the regulation specifies that the member should use the AWO procedure "[i]f *the Board member determines*" that the criteria are satisfied, 8 C.F.R. 1003.1(e)(4)(i) (emphasis added), not whether the criteria *are* satisfied, thus underscoring that the decision whether to utilize the AWO procedure is one for the judgment and discretion of the Board member alone. See *Webster* v. *Doe*, 486 U.S. 592, 600 (1988) (authorization under 50 U.S.C. 403(c) (1988) to terminate CIA employees whenever the Director of Central Intelligence "'shall *deem* such termination necessary or advisable' * * * not simply when the dismissal *is* necessary or advisable," "appears * * * to foreclose the application of any meaningful judicial standard of review").

Moreover, the regulation's express statement that the IJ's opinion becomes "the final agency determination," and the provision that the single Board member will not make any statement apart from specifying that the decision of the IJ will be the final agency decision, 8 C.F.R. 1003.1(e)(4)(ii), make clear that the Attorney General intended the courts of appeals to review the underlying decision of the IJ rather than that of the single Board member. See *Tsegay* v. *Ashcroft*, 386 F.3d 1347, 1357 (10th Cir. 2004) (noting that the only way to review the Board member's decision to apply the AWO procedure would be by "first remanding the case for an expanded explanation of why the BIA chose to apply the AWO regulation," which "would require the BIA to do exactly what it is prohibited from doing when it affirms without opinion"). Indeed, the Attorney General's explanation of the AWO procedures explicitly states that

"[f]or purposes of judicial review * * * the Immigration Judge's decision becomes the decision reviewed." 64 Fed. Reg. at 56,138. The Attorney General's view that his own AWO regulations create no judicially-enforceable rights is "controlling," since it is neither "plainly erroneous [n]or inconsistent with the regulation." *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997) (citation omitted).

ii. In agreement with the Eighth Circuit's decision in *Ngure*, the Second Circuit and Tenth Circuit have likewise held that they lack jurisdiction to review the Board's determination to apply its AWO procedure. See *Kambolli* v. *Gonzales*, 449 F.3d 454 (2d Cir. 2006); *Tsegay*, 386 F.3d at 1337 (10th Cir.).

As petitioner observes (Pet. 10), the Fifth and First Circuits, in *Zhu* v. *Ashcroft*, 382 F.3d 521, 527 (5th Cir. 2004), and *Haoud* v. *Ashcroft*, 350 F.3d 201, 205-206 (1st Cir. 2003), have addressed the reviewability of an AWO determination in a particular circumstance not present in this case. Both *Zhu* and *Haoud* were cases in which it was unclear whether the Board had affirmed the IJ's order denying asylum on the ground that the asylum application was untimely, in which case the court of appeals could not review the determination, see 8 U.S.C. 1158(a)(3), or because it found the standard for asylum unmet, which would be subject to review, 8 U.S.C. 1252(a)(2)(B)(ii). See *Zhu*, 382 F.3d at 527; *Haoud*, 350 F.3d at 206. In such a circumstance, the Fifth Circuit was of the view that it would find itself in "a jurisdictional conundrum," *Zhu*, 382 F.3d at 527, not knowing whether it had jurisdiction, and that a remand to the Board thus would be appropriate. See also *Lanza* v. *Ashcroft*, 389 F.3d 917, 932 (9th Cir. 2004) (remanding in same situation); *San Pedro* v. *Ashcroft*, 395 F.3d 1156, 1157-1158 (9th Cir. 2005) (same). That "jurisdictional conun-

drum" is not present in this case, and petitioner does not contend otherwise.[2]

Petitioner does argue (Pet. 26-27) that the decision below conflicts with the Third Circuit's decision in *Smriko* v. *Ashcroft*, 387 F.3d 279 (2004). That contention lacks merit. The Third Circuit held in *Smriko* that, in certain narrow situations, review of the Board's AWO determination is appropriate. See *id.* at 296-297. The Third Circuit emphasized in *Smriko*, however, that it did *not* endorse a general practice of reviewing the Board's determination to apply its AWO procedure separate from the underlying merits. On the contrary, the Third Circuit recognized that, even on its view, "[i]n many situations * * * a streamlining decision * * * will have no material impact on a court's exercise of its judicial review function" and, in such cases, "the reviewing court may simply choose to address the merits of the IJ's decision without resolving the procedural challenge." *Id.* at 296; see also *Chong Shin Chen* v. *Ashcroft*, 378 F.3d 1081, 1088 (9th Cir. 2004) (explaining that "in most cases" review of the Board's determination to apply its AWO procedure and of the IJ's decision on the merits "collapse into one analysis") (citation and internal quotation marks omitted).[3]

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[2] The particular problem confronted in *Zhu* and *Haoud* would not warrant review by this Court in any event. As the government explained in its briefs in opposition (at 15) in *Aleru* v. *Gonzales* (No. 04-670), and (at 20) in *Kebede* v. *Gonzales* (No. 04-280), the Board has altered its practices and has determined that in cases where the IJ's decision rests on both reviewable and nonreviewable grounds for denying relief from removal, AWO procedures should not be applied.

[3] The Sixth and Seventh Circuits have assumed, without deciding the question, that they have jurisdiction to review the Board's decision to apply its AWO procedure; but those courts have recognized that their review of the AWO decision, if it is separately reviewable, would generally merge with review of the merits. See *Denko* v. *INS*, 351 F.3d

Separate review would only be necessary, according to the Third Circuit in *Smriko*, in situations like those addressed in *Zhu* and *Haoud*, see *Smriko*, 387 F.3d at 296-297, or situations that otherwise have a "material impact on a court's exercise of its judicial review function," *id.* at 296. The Third Circuit concluded that the circumstances in *Smriko* fell into the latter category because the IJ had failed adequately to address the novel and difficult issue of statutory interpretation raised by the petition and there was no Board interpretation of the statute, and the court thus would be "left to interpret the statute without the [Board] having provided its *Chevron* deference-entitled 'concrete meaning' to an ambiguous statute." *Id.* at 297; see *id.* at 289. The court sought to avoid "building case law that is fashioned without the benefit of agency expertise" and "usurping the role of the [Board] and establishing a precedent that the Board's expertise might counsel against." *Id.* at 297; see *Chong Shin Chen*, 378 F.3d at 1088 (although in most cases merits review of IJ's decision and review of Board's AWO decision would collapse into one analysis, remand for the Board to consider an issue "in the first instance" is warranted when the court is "confronted with a novel legal issue"). Cf. *Haoud*, 350 F.3d at 207 (IJ had not been able to consider seemingly applicable Board precedent that postdated IJ's decision).

Unlike the Third Circuit in *Smriko*, the court of appeals below did not confront a situation in which the Board had failed to interpret an ambiguous statutory term and the court thus would be left to construe the statute in the first

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717, 732 (6th Cir. 2003); *Georgis* v. *Ashcroft*, 328 F.3d 962, 967 (7th Cir. 2003). The Fourth Circuit has concluded that the proper remedy for an erroneous AWO decision is judicial review of the merits by the court of appeals to correct the error. See *Blanco de Belbruno* v. *Ashcroft*, 362 F.3d 272, 281 (4th Cir. 2004).

instance. Rather, the court of appeals explained that the Board had interpreted the term "child abuse" to encompass "any form of cruelty to a child's physical, moral, or mental well-being." Pet. App. 5a. The court then reviewed the IJ's decision to examine whether petitioner's crime fit within that definition. *Id.* at 5a-6a. Nothing in the Third Circuit's decision in *Smriko* suggests that that court, if faced with comparable circumstances in which the Board had interpreted the relevant statutory term, would nonetheless review the Board's determination to apply its AWO procedure.[4]

Finally, petitioner errs in arguing (Pet. 28) that the court of appeals "assume[d] that it must give *Chevron* deference to IJ opinions affirmed by AWO orders." The court of appeals did not accord deference to the IJ's interpretation of the term "child abuse." Rather, the court determined that the Board had previously construed that term, deferred to the *Board*'s interpretation, and assumed that the IJ had applied the Board's construction. See Pet. App. 4a-5a. This case therefore raises no questions concerning whether, when reviewing an IJ decision in a case in which the Board applied its AWO procedure, a court should accord deference to the IJ's interpretation of an ambiguous statutory term. See Pet. 11, 28.

2. Petitioner contends (Pet. 29-30) that his crime did not amount to "any form of cruelty to a child's physical, moral or mental well-being," and therefore did not amount to "child abuse" so as to render him ineligible for cancellation

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[4] Because the court of appeals concluded that the Board had interpreted the statutory term "child abuse," the court, contrary to petitioner's suggestion (Pet. 28), did not infringe any "remand rule" (see, *e.g.*, *INS* v. *Ventura*, 537 U.S. 12 (2002)) by interpreting the statute in the first instance instead of remanding to permit the agency initially to construe the statute.

of removal. That fact-bound contention does not warrant review.

Even if, as petitioner contends, the offense of malicious punishment of a child under Minnesota law encompasses both conduct amounting to child abuse and conduct that fails to amount to "cruelty to a child's physical, moral or mental well-being," the court of appeals determined that petitioner's crime amounted to child abuse based on an examination of the criminal complaint against petitioner and of petitioner's statements during his guilty plea hearing. Pet. App. 6a. As the court explained, "the complaint alleged that [petitioner] repeatedly struck his stepson on the back and legs with the electrical cord from an iron," petitioner "admitted as much during his plea hearing," and the complaint further alleged that petitioner's stepson "suffered physical injuries, including two long, red, circular marks, and a large bruise on his thigh." *Ibid.* (internal quotation marks omitted). There is no warrant for reviewing the court of appeals' fact-specific determination that, in those circumstances, petitioner's crime qualifies as a crime of child abuse.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In the
Supreme Court of the United States

SERGIO LOEZA-DOMINGUEZ,
Petitioner,

v.

ALBERTO GONZALES, ATTORNEY GENERAL
OF THE UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONER'S REPLY BRIEF

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Respondent's brief in opposition obscures the real questions presented by the petition for a writ of certiorari. The argument at pages 6 - 9 of Respondent's brief mischaracterizes the petition as though it were challenging the Attorney General's authority to promulgate the AWO regulation. It does not. Petitioner agrees that "agencies should be free to fashion their own rules of procedure", *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 543 (1978), and for this reason he does not challenge the AWO regulation on its face. The Attorney General gets to say how the BIA will decide immigration appeals, and he is free to require three member panels, two member panels, or single member summary decisions. He could alter the BIA to screen appeals on a discretionary, certiorari-type basis. He might even abolish the BIA altogether. All of this is uncontroversial and beside the point.

The problem for courts is that the Attorney General has adopted procedures that authorize secret BIA decisions. *See Albathani v. I.N.S.*, 318 F.3d 365, 377 (1st Cir. 2003) ("Because the summary affirmance is only of the 'result' and not the reasoning, this means courts of appeals are forced to review a decision which may or may not contain the reasoning of the BIA. The court thus reviews the BIA decision without knowing its basis."). At pages 12 - 13 of his brief, Respondent once again concedes that in "jurisdictional conundrum" cases like *Zhu v. Ashcroft*, 382 F.3d 521, 527 (5th Cir. 2004), and *Haoud v. Ashcroft*, 350 F.3d 201, 205-206 (1st Cir. 2003), the BIA's undisclosed AWO decision is (1) a distinct agency decision, (2) that may be substantively different from the IJ's opinion, and (3) whose undisclosed reasoning is of independent legal consequence for the reviewing court to the extent that it differs from the reasoning of the IJ opinion in ways that could impact jurisdiction. In other words, for this category of cases, the

"affirmed" IJ opinion is not reliably "the final agency determination" for purposes of judicial review, even though the boilerplate language of the AWO says it is. Remand is necessary to clarify the actual basis of the BIA's undisclosed decision.

Respondent ignores the logical implications of his position when he insists that the secrecy of the AWO process only necessitates remand in this narrow category of jurisdictional conundrum cases. If, as Respondent agrees, differences between the BIA's secret AWO decision and the disclosed IJ opinion it purports to affirm do matter when those differences could alter the reviewing court's understanding of its jurisdiction (thus requiring remand to the BIA for clarification of its undisclosed reasoning), how can it be that all other kinds of substantive differences between a secret AWO decision and the disclosed IJ opinion it purports to affirm do not matter to the reviewing court for purposes of the remand rule of *SEC v. Chenery Corp.*, 332 U.S. 194 (1947); *INS v. Ventura*, 537 U.S. 12 (2002); and *Thomas v. Gonzales*, 126 S.Ct 1613 (2006)? If the BIA renders a secret decision in each AWO case, and the reasoning of that secret decision may be substantially different from the reasoning of the IJ opinion whose bare result is "affirmed", why wouldn't the remand rule be triggered? Respondent dodges the question.

Chenery's bedrock principle of administrative law is that a reviewing court may not affirm an agency decision on a basis the agency itself did not adopt, *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943)(*Chenery I*), and "it will not do for a court to be compelled to guess at the theory underlying the agency's action." *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)(*Chenery II*). Respondent argues for selective application of this rule: on the one hand, it is unacceptable for a court to guess about the basis of an AWO order where the

BIA's secrecy obscures its reasoning on issues that could impact jurisdiction, and there remand is necessary, but otherwise courts should be free to guess away, as happened here.

Here, the IJ ordered Mr. Loeza-Dominguez removed on alternative grounds. The IJ held that his conviction was both a "crime of child abuse" and "a crime involving moral turpitude." It is entirely plausible that the BIA affirmed the IJ only with respect to her determination that the conviction was a crime of moral turpitude.[1] Given *Chenery, Ventura,*

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[1] This is just one plausible example of what the BIA may well have done in the instant case when it issued the AWO order and affirmed the bare "result" of the IJ opinion:

> **The Board affirms the results of the decision below.** We will dismiss the alien's appeal and affirm the immigration judge's determination that his state conviction for "malicious punishment of a child" is a crime involving moral turpitude. See *Matter of Tran*, 21 I&N Dec. 291, 293 (BIA 1996)("The essence of moral turpitude is an evil or malicious intent."). The alien also argues that the immigration judge erred when she found his conviction constitutes a "crime of child abuse" within the meaning of 8 U.S.C. § 1227(a)(2)(E)(i). The Board has not yet directly addressed the scope of this provision, and as the immigration judge did not provide significant analysis of the statute we do not and need not adopt this aspect of her decision. While the alien's arguments may have merit, we need not resolve that issue here. Even assuming the immigration judge erred in this aspect of her decision, any such error would be harmless because we affirm and adopt her alternative determination on the moral turpitude charge. **The decision below is, therefore, the final agency determination.**

and *Thomas*, this presents a conundrum no less problematic than the type acknowledged by Respondent, it just happens to concern potential substantive differences between the secret BIA decision and the disclosed IJ opinion that would not obviously affect circuit court jurisdiction. *Ventura* and *Thomas* both enforced the remand rule with respect to questions of substantive immigration law that did not impact federal court jurisdiction.

Respondent, at pages 14 - 15 of his brief, tries to gloss over the Eighth Circuit's quintessential *Chenery* violation, fantasizing that the court of appeals really believed it was just applying the BIA's own holding about the "crime of child abuse" removal statute. In reality, the *Chenery* violation was compounded. Not only did the Eighth Circuit decide an important question of immigration law in the first instance and in the absence of the Attorney General's position on the statute, the court did so by adopting the *post hoc* argument of government counsel. The government counsel acknowledged his argument was drawn from dicta in the BIA case, *Rodriguez-Rodriguez*, 22 I&N Dec. 991, 996 (BIA 1999), a case that (1) was never cited by any party to the administrative proceedings below, (2) was never mentioned by the IJ or BIA, and (c) addressed the scope of a completely separate provision of the removal statute.

Contrary to Respondent's assertions, the Eighth Circuit well understood that it had no meaningful agency answer to the question of whether Mr. Loeza-Dominguez's conviction constitutes a "crime of child abuse." But the court also understood that remanding the case for that agency answer would concede Mr. Loeza-Dominguez's point that the BIA had misapplied the AWO regulation to his case -- a matter that *Ngure v. Ashcroft*, 367 F.3d 975, 983 (8th Cir. 2004), insists is wholly committed to agency discretion beyond

review. The obvious tension between *Chenery's* remand rule and *Ngure's* controversial holding is what drove the Eight Circuit to seize upon the government's *post hoc* argument and alchemize BIA dicta into the needed agency answer.

Respondent claims there is no conflict between the Eighth Circuit's decision here and the Third Circuit's decision in *Smriko v. Ashcroft*, 387 F.3d 279 (3d Cir. 2004). Brief in Opposition at pages 13 - 15. The conflict could not be clearer. This case is a gem because it so vividly confirms the Third Circuit's prediction that *Ngure* would inevitably lead the Eighth Circuit to usurp the BIA's functions and build "case law that is fashioned without the benefit of agency expertise." *Smriko*, 387 F.3d at 297. This case demonstrates that the circuit conflict is intractable. The First, Third, Fifth, and Ninth circuits will correct BIA misapplication of the AWO regulation and remand to the BIA, while the Second, Eighth, and Tenth Circuits, based on their distorted reading of 5 U.S.C. § 701(a), will not.[2]

The petition for a writ of certiorari should also be granted because this case illustrates that the IJ opinion is not actually "the final agency determination" for purposes of judicial review in a much broader set of circumstances than the courts of appeals have thus far recognized. Circuit court review of "affirmed" IJ opinions in AWO cases is inconsistent with *Chenery, Ventura,* and *Thomas*, and so problematic that it

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[2] *Compare Haoud*, 350 F.3d 201, 205-06 (1st Cir. 2003); *Smriko*, 387 F.3d 279, 290-95 (3d Cir. 2004); *Zhu*, 382 F.3d 521, 527(5th Cir. 2004); and *Lanza v. Ashcroft*, 389 F.3d 917, 932 (9th Cir. 2004), *with Kambolli v. Gonzales*, 449 F.3d 454 (2d Cir. 2006); *Ngure*, 367 F.3d 975, 983 (8th Cir. 2004); *Tsegay v. Ashcroft*, 386 F.3d 1347 (10th Cir. 2004).

warrants from this Court's precedents that it warrants the immediate intervention of this Court and summary reversal.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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